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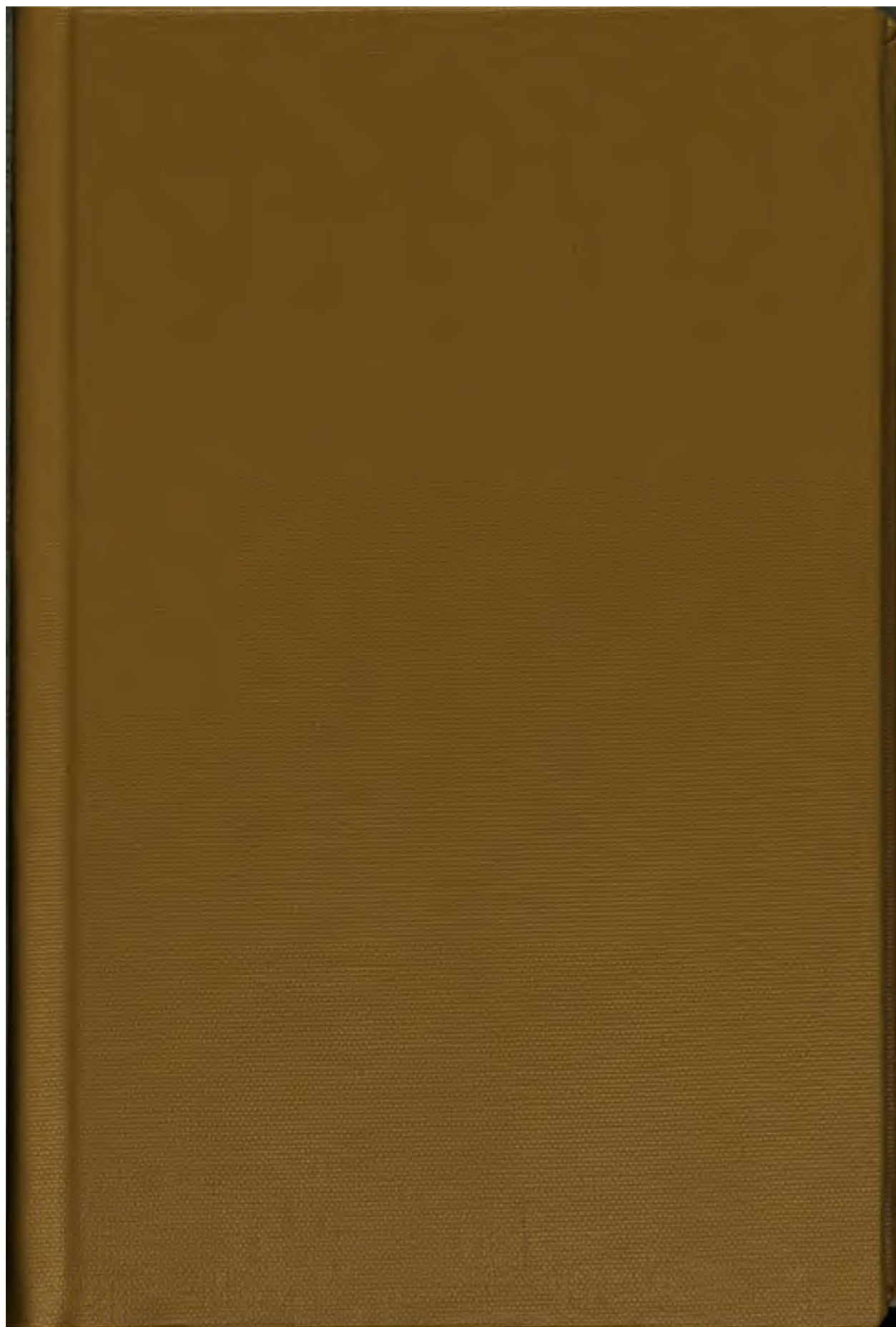
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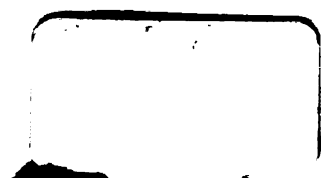
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A TREATISE
ON
THE LAW
OF
SURETYSHIP AND GUARANTY.

By
DARIUS H. PINGREY, LL. D.,
AUTHOR OF TREATISES ON CHATTEL MORTGAGES, REAL ESTATE MORTGAGES
AND REAL PROPERTY.

ALBANY, N. Y.:
MATTHEW BENDER.
1901.

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PREFACE.

It has been the endeavor in writing this work to present a systematic and concise treatise on the subject of Suretyship and Guaranty. To do this the early and leading cases have been used to show the elementary and indisputable principles of the subject. The other cases, including the very latest, have been cited to show the application of these principles in the interpretation of the law of to-day, which is the most useful because the most needed.

It has been the aim to state the principles of law as settled by the weight of authority, in a clear and succinct manner, without entering upon a protracted philosophical discussion, or marshaling in the text an array of conflicting decisions, except as to the established law of the different States.

A more elaborate work could have been constructed with less time and labor. Definitions have been formulated and principles stated, it is hoped, with perspicuity and accuracy. Many cases have been cited which may be used as a basis of an exhaustive examination of the subject when a brief is desired.

The student will find that this treatise will serve him in the law school and then in his practice; having studied the work, he will know where to find the law, a knowledge which distinguishes every great lawyer.

In conclusion it is proper to say that this work has been prepared by the author's personal labor.

DARIUS H. PINGREY.

Bloomington, Ill., Jan. 21, 1901.

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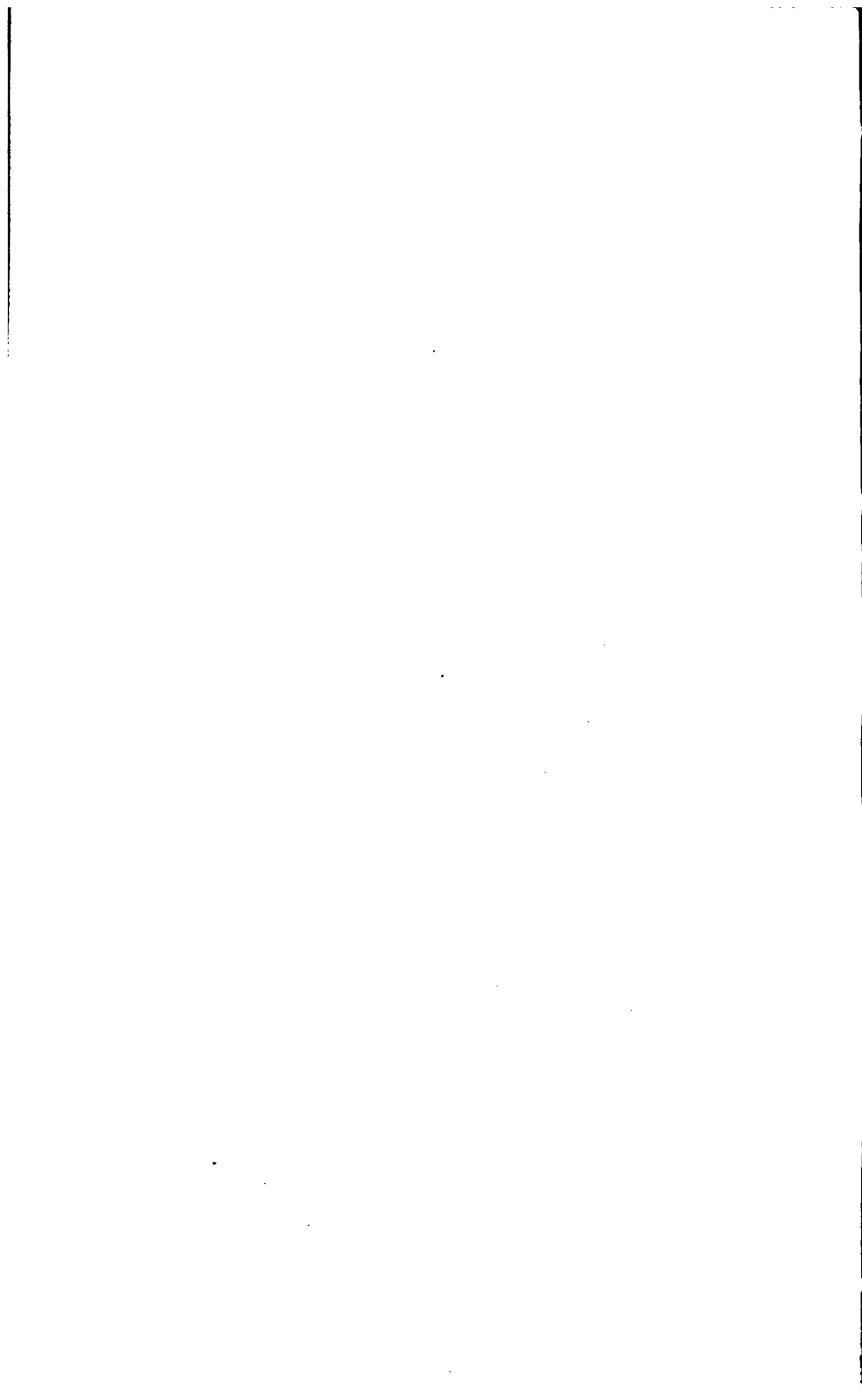


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THE LAW

OF

SURETYSHIP AND GUARANTY.

CHAPTER I.

NATURE AND EFFECT.

SEC. 1. PRINCIPAL.—The principal is the debtor who is primarily liable. He is primarily concerned and, therefore, cannot be an accessory or ancillary. The contract of indebtedness is made by the principal, who is liable to pay the debt, though the surety is also liable. They can in most States be sued jointly or severally. But the obligation of the surety is to the creditor or obligee, and not to the principal;¹ and the liability of the surety cannot exceed that of the principal.² And the surety has a right to be protected by his principal, and can enforce that right when the principal is financially responsible.³ The surety is liable to the obligee or creditor to the same extent as the principal, and such liability need not be fixed by judgment.⁴

At common law a principal and surety could be joined as parties defendants only in an action where their undertaking was joint or joint and several.⁵ But now in most of the States they can be sued jointly or severally whether their undertaking is joint or several.

¹ *Benjamin v. Ver Nooy*, 36 App. Div. 581.

² *United States v. Allsburg*, 4 Wall. 186.

³ *Roberts v. Trust Co.*, 83 Ill. App. 463; *Fritch v. Bank*, 191 Pa. St. 283.

⁴ *Kroncke v. Madson* (Neb.), 77 N. W. Rep. 202; *Judge v. Sulloway*, 68 N. H. 511.

⁵ *People v. Miller*, 2 Ill. 83; *Castner v. Slater*, 50 Me. 212; *Lee v. Bolles*, 20 Mich. 46.

§ 2. SURETY.—A person who engages to be answerable for the debt, default or miscarriage of another is a surety. He undertakes to pay the debt if the principal does not.⁶ He is an insurer of the debt.⁷ The surety assumes to perform the contract of the principal if he should not, and if the act which the surety undertakes to perform through the principal is not done, then the surety is liable at once.⁸

A surety is usually bound with his principal by the same instrument, executed at the same time and with the same consideration. He is an original promisor and debtor from the beginning, and must know every default of his principal. He is bound with and for another, who is primarily liable, and who is called the principal. The surety engages to answer for another's appearance in court, or for his payment of a debt, or for the performance of some act.

§ 3. CO-SURETY.—Persons are co-sureties, so as to give the right of contribution, when they are bound for the performance, by the same principal, of the same obligation, and, whether they become so at the same time or at different times by one or several instruments, even if they are bound in different sums, or if each is ignorant that the others are sureties—does not affect the relation nor the right. Thus, where a party is surety for \$2,000, and another party becomes surety for \$1,000 for the same debt by the same principal and has to pay that amount, he may have contribution from the first surety, who is ignorant of the second contract of surety, it being at a different time and by a different instrument.⁹ But this doctrine does not hold where the obligations are for wholly distinct things, though arising from the same principal indebtedness; where the obligations have no relation to nor operation upon one another, though they arise from

⁶ *McIntosh-Huntington Co. v. Reed*, 89 Fed. Rep. 464.

⁷ *Kramph v. Hatz*, 52 Pa. St. 525.

⁸ *Reigart v. White*, 52 Pa. St. 438.

⁹ *Ellesmere Brewing Co. v. Cooper* (1896), 2 Q. B. 75; *Galson v. Brand*, 75 Ill. 148; *Robinson v. Boyd*, 60 Ohio St. 157; *Young v. Shunt*, 30 Minn. 503; *Warner v. Morrison*, 3 Allen, 566; *Rosenbaum v. Goodman*, 78 Va. 121; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Deering v. Winchelsea*, 1 Cox, 318.

the same principal indebtedness, the parties are not co-sureties. Thus, A, B and C are sureties on D's bond. D makes default, judgment is rendered against him and an execution is levied on his goods. He gives a forthcoming bond, signed by A and B as sureties. A second default is made by D on this forthcoming bond, and A paid the amount and then endeavored to have contribution from C, who was on the original bond, but not on the forthcoming bond. Here the obligations are not the same, as C is not A's co-surety.¹⁰

§ 4. DISTINCTION BETWEEN SURETYSHIP AND GUARANTY.—The distinction between the obligation of suretyship and guaranty, is that the surety undertakes to pay if the principal does not; while the guarantor undertakes to pay if the principal cannot; that is, if he is insolvent and unable to pay.¹¹ The surety is directly liable to the creditor for the act to be performed, while the guarantor is liable only for the ability of another to perform this act. The undertaking under suretyship is immediate and direct that the act shall be done; if not done, the surety becomes at once responsible. In the case of guaranty, non-liability of the debtor, that is, his insolvency, must first be shown before the guarantor becomes liable.¹²

In a strict guaranty the guarantor does not undertake to do the thing which his principal is bound to do, but his obligation is that the principal shall perform such act as he is bound to perform, or in the event he fails that the guarantor will pay such damages as may result from such failure. So when there is in any instrument a promise or undertaking on the part of a person executing it to do a particular thing which another is bound to do, in the event such other person does not perform the act, it is an original undertaking and not a strict or collateral guaranty. It is an undertaking in the nature of a surety, and

¹⁰ *Harrison v. Lane*, 5 Leigh, 414; *Langford v. Perrin*, 5 Leigh, 552; *Rosenbaum v. Goodman*, 78 Va. 121; *Hutchinson v. Roberts*, 8 Houst. (Del.) 459.

¹¹ *McIntosh-Huntington Co. v. Reed*, 89 Fed. Rep. 464; *Kramph v. Hatz*, 52 Pa. St. 525. See sec. 339.

¹² *Reigart v. White*, 52 Pa. St. 440.

the person bound by it must take notice of the default of his principal.¹³

The contract of a guarantor is collateral and secondary; that of the surety is direct; the guarantor contracts to pay if by the use of due diligence the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment and is so responsible at once if the principal debtor makes default.¹⁴ The surety is an insurer of the debt, the guarantor of the solvency of the debtor. The contract of the guarantor for collection is conditional on the creditor's diligence to collect the debt; a mere delay will not release a surety. To be released the surety must demand proceedings with notice that he will not be bound if they are not instituted.¹⁵ A guaranteed contract of collection becomes absolute only by due and unsuccessful diligence to obtain satisfaction from the principal debtor.¹⁶ Thus, a delay of more than two years to enter judgment notes against a failing debtor discharges the guarantor.¹⁷ So delay of eight years to sue a note discharges the guarantor of the debt.¹⁸

A surety is in the first instance answerable for the debt for which he makes himself responsible; his contracts are often specialties; while the guarantor is only liable where default is made by the party whose undertaking is guaranteed, and his agreement is one of simple contract. The surety is not entitled to notice, and is not discharged by the insolvency of the principal for want of notice, although the principal debtor was solvent when the debt became due. In regard to a guarantor, if the debt is not paid at maturity by the principal and he is solvent at the time, the guarantor will be discharged, if he has not received notice, if the principal shall become insolvent. The guarantor is entitled to notice within a reasonable time that the

¹³ *Woods v. Sherman*, 71 Pa. St. 100; *Riddle v. Thompson*, 104 Pa. St. 330; *Wright v. Griffith*, 121 Ind. 478.

¹⁴ *Kearnes v. Montgomery*, 4 W. Va. 29; *Bailey Loan Co. v. Seward*, 9 S. Dak. 326.

¹⁵ *Kramph v. Hatz*, 52 Pa. St. 525.

¹⁶ *Gilbert v. Henck*, 30 Pa. St. 205.

¹⁷ *Miller v. Berby*, 27 Pa. St. 317.

¹⁸ *Isett v. Hoge*, 2 Watts, 128.

debt is not paid when due, and if not notified he will be discharged when he can show a direct injury for want of notice.¹⁹

There is also a distinction between guaranty of payment and guaranty of collection. A guaranty of payment is an absolute unconditional undertaking on the part of the guarantor that the maker will pay the note, while a guaranty of collection is an undertaking to pay if payment cannot by reasonable diligence be obtained from the principal debtor.²⁰ However, there are two lines of decisions, which cannot be reconciled, as to guaranty of payment, whether absolute or conditional.²¹

§ 5. HOW CREATED.—Suretyship may be created by express contract of the parties, or by the operation of law. Where there is an express contract, the relation does not exist when the party contracting is the direct beneficiary, and the contract is entered into by him for his own benefit, for then he is principal and not surety.²² There is no difference between a suretyship created by law and created by acts of the parties.²³

§ 6. NATURE OF SURETY'S LIABILITY.—Whether a surety's liability is a debt is a question not answered the same. It has been held that the obligation of a surety or indorser is not a debt,²⁴ because the liability is contingent; and it is not a debt until the indorser is obliged to pay the note.²⁵ Hence, a surety on a note not yet due, before payment by him, cannot claim his liability as a debt which he may prove before the assignee of his principal, nor will he be barred from his future action against his insolvent principal, who has been discharged from bankruptcy.²⁶

But there is another line of cases that hold that a surety's

¹⁹ *Courtis v. Dennis*, 7 Met. 510.

²⁰ *Cowes v. Peck*, 55 Conn. 251; *Beardsley v. Hawes*, 71 Conn. 39.

²¹ See sec. 339.

²² *Wimberly v. Windham*, 104 Ala. 409.

²³ *Wyman v. Jones*, 58 Mo. App. 313.

²⁴ *May v. Hammond*, 144 Mass. 151.

²⁵ *Frothingham v. Haley*, 3 Mass. 168.

²⁶ *Paul v. Jones*, 1 Term R. 599; *Frost v. Carter*, 1 Johns. Cas. 73. See, also, *State v. Gambs*, 68 Mo. 289; *Eddy v. Heath*, 31 Mo. 141.

liability is a debt. So a surety upon an official bond is a debtor.²⁷ Because the word "debt" includes not only debts of record or judgment, but also obligations arising under simple contracts to a very wide extent; and it includes all that is due to a man under any form of obligation or promise. Whatever the law orders any one to pay, that becomes instantly a debt which he has beforehand contracted to pay.²⁸ So a surety on a note who executes a mortgage to the payee for securing payment of a note, is a debtor entitled to have the value of the mortgage deducted from the whole debt.²⁹

So a devise to executors with authority to sell real estate of the testator for the payment of his debts, applies as well to a joint and several bond executed by him as surety for his co-obligators to any other debts.³⁰ So where the condition in a chattel mortgage shows that the mortgage was given to secure the mortgagee against liability as an indorser for the mortgagor, the mortgage was given to secure a debt of the mortgagor.³¹

§ 7. IGNORANCE OF CO-SURETY'S OBLIGATION.—It is wholly immaterial that sureties sign at different times and without any agreement to become joint sureties. The law raised an implied promise from the mutual relation of the parties. Hence, it follows that it does not make any difference as to the right to claim contribution that each of the sureties was ignorant that the other was bound with him for the payment of the debt. Their liability exists, although they are bound by distinct and separate instruments. It is sufficient if they are sureties for the same debt of a third person.³²

§ 8. SUBSTITUTION OF SURETIES.—If one set of sureties has been substituted for others whose liability has ceased, the former

²⁷ *Shane v. Francis*, 30 Ind. 92.

²⁸ *Gray v. Bennett*, 3 Met. 522.

²⁹ *Lanckton v. Wolcott*, 6 Met. 305.

³⁰ *Berg v. Radcliff*, 6 Johns. Ch. 302.

³¹ *Gilbert v. Vail*, 60 Vt. 266.

³² *Craythorne v. Swinburne*, 14 Ves. 160; *Schram v. Werner*, 85 Hun, 293; *Stovall v. Bank*, 78 Va. 188; *Robinson v. Boyd*, 60 Ohio St. 57.

are not liable on the last instrument. A surety may pay and extinguish the original obligation by his own note, and then be entitled to contribution from his co-sureties; but he would not be entitled to contribution if the original obligation is paid and discharged by a new note of the principal and one of the sureties.³³ Thus, where an insolvent principal and one of several sureties execute their note instead of a former note, the surety upon such new note cannot have contribution of the old sureties on the old note.³⁴

§ 9. SUCCESSIVE BONDS.—Where sureties are discharged and new sureties taken, the two sets of sureties become jointly liable for a breach of the bond which accrued before discharge, and the right of contribution exists as between co-sureties. The new bond relates back, and the two sets of sureties are jointly liable for breach committed prior to the second execution.³⁵

§ 10. AGREEMENT AS TO LIABILITY AMONG SURETIES.—Co-sureties may, by agreement among themselves, so far sever their unity of interest and obligation as to determine the right of contribution.³⁶ A surety has the right to determine for himself on what condition he will become surety and to fix the nature of his liability as between himself and the prior maker; and by agreement between him and said principal, the liability of said subsequent signer may be made that of all sureties for all the makers who have signed before him.³⁷ If one surety, instead of uniting with the others, signs as surety for the others, they have the right of contribution against him. His right against them is not for contribution, but for full indemnity.³⁸ And when the

³³ *White v. Colton*, 52 Ind. 372; *Ballston v. Wood*, 15 Iowa, 160.

³⁴ *Bell v. Boyd*, 76 Tex. 133; *Tittle v. Bennett*, 94 Ga. 405; *Chapman v. Garber*, 46 Neb. 16.

³⁵ *Pinkstaff v. State*, 59 Ill. 148; *State v. Berning*, 74 Mo. 87; *Powell v. Powell*, 84 Cal. 234; *Schofield v. Churchill*, 72 N. Y. 565; *Choate v. Arrington*, 116 Mass. 552; *Morley v. Metamora*, 78 Ill. 394. See secs. 168, 209.

³⁶ *Robertson v. Deatharge*, 82 Ill. 511.

³⁷ *Baldwin v. Fleming*, 90 Ind. 177.

³⁸ *Craythorne v. Swinburne*, 14 Ves. 164; *McDonald v. Magruder*, 3 Pet. 470; *Hamilton v. Johnston*, 82 Ill. 39; *Paul v. Berry*, 78 Ill. 158.

old note is superseded by a new note made by the sureties, which is to be void if the old note is paid, this is a renewal and not an independent indebtedness.³⁹

§ 11. GRANTEE OF MORTGAGED PREMISES.—As between the grantor, who is personally liable, and the grantee of mortgaged premises, the grantee assuming the indebtedness, the grantee becomes the principal and the grantor, surety, a surety for the payment of the debt, with a surety's right.⁴⁰

The purchaser who assumes the payment of a mortgage by agreement when he buys the mortgaged land, takes upon himself the burden of the debt or claim secured by the mortgage, and, as between him and the grantor, he becomes the principal, and the grantor, or mortgagor, a surety for the payment of the debt.⁴¹

And in such case, if the mortgage is foreclosed and the land sold to pay the debt, leaving unpaid a portion thereof, which the grantor pays, the latter cannot maintain an action for indemnity on the recital in the deed, the promise therein not running to him, but must resort to an action on the implied promise of indemnity which arises in every instance when a surety pays the debt of his principal, as for money paid for the use of the principal.⁴² But as to the holder of the note and mortgage, both grantor and grantee are principals, and are liable to the creditor as such if he so desires.⁴³

³⁹ *Bank v. Eyre*, 107 Iowa, 13.

⁴⁰ *Insurance Co. v. Hanford*, 143 U. S. 187; *Rice v. Sanders*, 152 Mass. 108; *Ellis v. Johnson*, 96 Ind. 377; *Cook v. Berry*, 193 Pa. St. 377; *Ayers v. Dixon*, 78 N. Y. 318; *Palmeter v. Carey*, 63 Wis. 426; *Webster v. Fleming*, 178 Ill. 140; *Pratt v. Conway (Mo.)*, 49 S. W. Rep. 1028; *Pingrey on Mort.* 868, 869.

⁴¹ *George v. Andrews*, 60 Md. 26; *Stephenson v. Elliott*, 53 Kan. 550; *Flagg v. Giltmaker*, 98 Ill. 293; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Poe v. Dixon*, 60 Ohio St. 124; *Comstock v. Drohan*, 71 N. Y. 13; *Calvo v. Davies*, 73 N. Y. 211.

⁴² *Poe v. Dixon*, 60 Ohio St. 124; *Hill v. Wright*, 23 Ark. 530; *Appleton v. Bascom*, 3 Met. 169; *Homes v. Weed*, 19 Barb. 128; *Toon v. Goodrich*, 2 Johns. 213; *Huntley v. Sanderson*, 1 Cr. & M. 467; 2 Barnard, 26.

⁴³ *Jones v. Foster*, 175 Ill. 459; *Ins. Co. v. Hanford*, 143 U. S. 187.

According to the view which prevails in Illinois and some other States,

§ 12. RIGHTS OF MORTGAGEE—IN EQUITY OR IN LAW.—At law it was formerly held that the contract of assumption by the purchaser, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee.⁴⁴ But it was held in equity that the mortgagee may avail himself of the right of the mortgagor against the purchaser; because in equity a creditor shall have the benefit of any obligation or security given by his principal to the surety for the payment of the debt.⁴⁵

In the United States the trend of the decisions is that the legal effect of the transaction is to leave the portion of the purchase money represented by the incumbrance in the hands of the purchaser for the purpose of paying the indebtedness; the promise being made for the benefit of the holder of the incumbrance, he may maintain an action at law to enforce it. Hence, the mortgagee may maintain an action at law to enforce the contract of assumption of the mortgage debt by the grantee.⁴⁶ And where several mortgage debts are assumed each mortgagee may sue at law in a separate action for his debt.⁴⁷

§ 13. THE MORTGAGEE MUST ASSENT.—But the mortgagee must consent in order to make the grantee of the mortgaged

a covenant to assume and agree to pay the mortgaged debt by the grantee is valid and may be enforced by the mortgagee against him. But according to the New York rule, which is followed in New Jersey and some other States, such covenant is construed to be a contract of indemnity for the benefit of the grantor, and where there is no personal liability on the grantor none passes to the grantee. For a discussion of this subject, see *McKay v. Ward* (Utah), 57 Pac. Rep. 1024.

⁴⁴ *Gandy v. Gandy*, 30 Ch. Div. 57, 67; *National Bank v. Grand Lodge*, 98 U. S. 123, 124.

⁴⁵ *Hampton v. Phipps*, 108 U. S. 260, 263; *Wright v. Morley*, 11 Ves. 12, 22.

⁴⁶ *Keller v. Ashford*, 133 U. S. 610; *Insurance Co. v. Hanford*, 143 U. S. 187; *Calvo v. Davies*, 73 N. Y. 211; *Bowen v. Beck*, 94 N. Y. 86; *Webster v. Fleming*, 178 Ill. 140; *Joslin v. Car Spring Co.*, 36 N. J. L. 141; *Pingrey on Mort.* 869; *Bassett v. Hughes*, 43 Wis. 319; *Lamb v. Tucker*, 42 Iowa, 118; *Bohanan v. Pope*, 42 Me. 93; *Follanshee v. Johnson*, 28 Minn. 311; *Townsend v. Long*, 77 Pa. St. 143; *Keedle v. Flack*, 27 Neb. 836; *Anthony v. Herman*, 14 Kan. 494; *Thompson v. Thompson*, 4 Ohio St. 333.

⁴⁷ *Poe v. Dixon*, 60 Ohio St. 124.

premises liable as principal and the mortgagor surety. Until acceptance by the mortgagee, there is no privity of contract between him and the grantee of the mortgaged premises.⁴⁸ So where the grantee expressly promises to pay the mortgage debt, that alone, without the assent of the mortgagee, does not change the mortgagor into a surety merely.⁴⁹ Whether the remedy of the mortgagee against the grantee is at law, and in his own right, or in equity, in the right of the mortgagor, must be determined by the law of the place where the suit is brought.⁵⁰

§ 14. ACCOMMODATION INDORSER.—The relation of an accommodation indorser and the party accommodated is that of principal and surety as between themselves.⁵¹ It has been held by some courts that an accommodation indorser is not within the statute allowing a surety to require the creditor, in certain cases, to proceed against the principal, or in default thereof to lose his remedy against the surety.⁵² But in other jurisdictions this rule is not adopted, and an accommodation indorser of a promissory note stands in the relation of surety for the maker for whose accommodation he became indorser, within the meaning of the statute in relation to the remedies of sureties against the principals.⁵³ Where a party gives his accommodation note to another in exchange for a like note of the latter to him, he is liable on his note as a principal and not as a surety,⁵⁴ but he may be a surety as between other parties.⁵⁵

⁴⁸ *Bank v. Kirkwood*, 172 Ill. 563; *Insurance Co. v. Hanford*, 143 U. S. 187. See, *Webster v. Fleming*, 178 Ill. 140.

⁴⁹ *Shepherd v. May*, 115 U. S. 505; *Keller v. Ashford*, 133 U. S. 610; *Bank v. Kirkwood*, 172 Ill. 563; 184 Ill. 139, overruling in effect, on this point, *Bay v. Williams*, 112 Ill. 91.

⁵⁰ *Insurance Co. v. Hanford*, 143 U. S. 187.

⁵¹ *Hall v. Oberhellman*, 23 Mo. App. 336; *Clason v. Morris*, 10 Johns. 524; *Sublett v. McKinney*, 19 Tex. 438. See sec. 347.

⁵² *Clark v. Barrett*, 19 Mo. 39; *Bootsman's Sav. Bank v. Johnson*, 20 Mo. App. 316.

⁵³ *Lacy v. Loftus*, 26 Ind. 324; *Ward v. Stout*, 32 Ill. 399; *Thompson v. Taylor*, 72 N. Y. 32; *Van Alstyne v. Sorley*, 32 Tex. 518.

⁵⁴ *Newmarket Sav. Bank v. Hanson*, 67 N. H. 509.

⁵⁵ *Whitney v. Hale*, 67 N. H. 385. See secs. 206, 347.

§ 15. THE ACCEPTOR OF DRAFTS.—The acceptor of a bill and the maker of a note are the principals, and the indorsers sureties.⁵⁶ By the acceptance of a draft, the acceptor becomes, not merely the surety for the drawer, but the principal debtor.⁵⁷

§ 16. INDORSER OF NOTES.—Each indorser upon bills of exchange or promissory notes is *prima facie* bound to indemnify each subsequent party to the instrument, and has a right to be indemnified by each prior party thereto.⁵⁸ The acceptor or maker is the principal debtor, and then the drawer and indorsers in the order in which their names appear upon the instrument.⁵⁹

An indorser of a promissory note, though in the nature of a surety, is not entitled for all purposes to the privileges of that character, as he is answerable upon an independent contract, and it is his duty to take up a note when it is dishonored.⁶⁰ There is, in some respects, a resemblance between an indorser and a surety, but in others there is none, as he does not in any case lose his character of indorser, nor can he be made liable on the note without proof of due demand and notice.⁶¹

§ 17. NOTES PAYABLE TO MAKER.—By the law merchant a party indorsing a note payable to maker, who first indorses it, is not merely a surety, but an indorsee, and entitled to demand notice.⁶²

The Illinois statute, which provides that indorsers of notes made payable to bearer, shall be held as guarantors of payment, does not apply to notes payable to the maker's order and by him

⁵⁶ *Diversy v. Moor*, 22 Ill. 331; *Cornise v. Kellogg*, 20 Ill. 11; *Yallop v. Ebers*, 1 Barn. & Ad. 703; *In re Babcock*, 3 Story, 399.

⁵⁷ *Marsh v. Low*, 55 Ind. 271; *Fuller v. Leonard*, 27 La. Ann. 635; *Davis v. Baker*, 71 Ga. 33.

⁵⁸ *McDonald v. Magruder*, 3 Pet. 470.

⁵⁹ *Ross v. Jones*, 22 Wall. 576, 593; *Clark v. Devlin*, 3 Bul. & P. 363.

⁶⁰ *Ellsworth v. Brewer*, 11 Pick. 320.

⁶¹ *Bradford v. Corey*, 5 Barb. 462. See sec. 347.

⁶² *Field v. Newspaper Co.*, 21 La. Ann. 24; *Dubois v. Mason*, 127 Mass. 37.

indorsed in blank;⁶³ he is only a second indorser, and parol evidence is not admissible to show a different contract.⁶⁴

§ 18. PLEDGING OR MORTGAGING PROPERTY TO SECURE DEBT OF ANOTHER PERSON.—When a third person pledges his property as security for the payment of a debt or obligation of another, such property will stand in the position of a surety of the debt.⁶⁵ This rule also applies to mortgages made by one person to secure the debt of another.⁶⁶

§ 19. MORTGAGING OF WIFE'S SEPARATE PROPERTY TO SECURE THE DEBTS OF HER HUSBAND.—In many of the States, if a wife mortgages her separate estate to secure her husband's debt, she becomes a surety only, and may demand such rights as a surety could claim.⁶⁷ But the wife's rights are controlled by local statutes, which differ greatly and must be consulted. In some of the States she has the same rights as her husband as to disposition of property. She has the same rights to contract as if she was sole.⁶⁸ In other States she is prohibited from mortgaging her estate to secure her husband's debt.

§ 20. DISSOLUTION OF PARTNERSHIP—ONE OR MORE PARTNERS ASSUMING PARTNERSHIP DEBTS.—After dissolution of the partnership, and one or more assume the payment of the firm debts, releasing the others, they stand as between themselves, principal and surety; the assuming partners become the principal and the retiring partners the surety.⁶⁹ So when one partner retires from the firm and those remaining assume the partnership debts, the retiring partner becomes surety as between themselves, but his relation to the partnership creditors is not changed

⁶³ Chicago Trust & Sav. Bank v. Nordgren, 157 Ill. 663.

⁶⁴ Hatley v. Pike, 162 Ill. 241.

⁶⁵ Price v. Bank, 114 Ill. 317.

⁶⁶ Ryan v. Shawneetown, 14 Ill. 20; Crawford v. Richeson, 101 Ill. 351; Burnap v. Bank, 95 N. Y. 125; Christner v. Brown, 16 Iowa, 130.

⁶⁷ Bank v. Brown, 46 N. Y. 170.

⁶⁸ Worrell v. Forsyth, 141 Ill. 22. See, also, Bank v. Lumber Co., 100 Tenn. 479.

⁶⁹ Moore v. Tapliff, 107 Ill. 241; Wandlandt v. Sohre, 37 Minn. 162.

without their consent, and as to them, he is still a principal with the others.⁷⁰

§ 21. PARTNERS OR PRINCIPALS AGREEING AMONG THEMSELVES—EFFECT ON CREDITORS' RIGHTS.—The great weight of authority is that two or more principal debtors cannot, by agreement among themselves, without consent of the creditor, so change the character of the liability of one of them to such creditor, from principal to surety, as to entitle him to demand from the creditor the treatment of a surety for the debt. That is, a retiring partner or other principal debtor cannot become a surety as to the creditor by simply informing him that his co-debtors have agreed that he shall be held only as a surety.⁷¹

However, there is a contrary doctrine, which holds that the surety being made known to the creditor, imposes upon him the obligation to treat him as surety from the time the information is received. Hence, the principal obligors in a contract may by agreement between themselves change the obligation of one or more of them from that of principal debtor to that of surety, and upon notice of such agreement to the obligee, the same effect will be given as if the suretyship originated in the contract itself.⁷² Such doctrine is unsound, and makes the creditor

⁷⁰ *Shapleigh Hardware Co. v. Wells*, 90 Tex. 110; *Buchanan v. Clark*, 10 Grat. 164; *Swire v. Boyers*, 1 Q. B. Div. 536; *Hall v. Long*, 56 Ala. 493; *Skinner v. Hill*, 32 Mo. App. 409; *Whittier v. Gould*, 8 Watts, 485; *Shepherd v. May*, 115 U. S. 505; *Gillen v. Peters*, 39 Kan. 489; *Conwell v. McCowan*, 81 Ill. 285.

⁷¹ *Story* on Part. 158; *Bates* on Part. 533; *Lindley* on Part. 295; *Parson* on Part. (3rd ed.) 428; *White v. Boone*, 71 Tex. 712; *Shepherd v. May*, 115 U. S. 505; *Rawson v. Taylor*, 30 Ohio St. 389; *Skinner v. Hall*, 32 Mo. App. 409; *First Nat. Bank v. Finck*, 100 Wis. 446; *Barnes v. Boyers*, 34 W. Va. 303; *Swire v. Redman*, 1 Q. B. D. 536; *Hall v. Long*, 56 Ala. 493; *Shapleigh Hardware Co. v. Wells*, 90 Tex. 110; *Keller v. Ashford*, 133 U. S. 610; *Bank v. Kirkwood*, 172 Ill. 563.

⁷² *Colgrove v. Tallman*, 67 N. Y. 90; *Smith v. Sheldon*, 35 Mich. 49; *Campbell v. Floyd*, 153 Pa. St. 84; *Williams v. Boyd*, 74 Ind. 286; *Gates v. Hughes*, 44 Wis. 332; *Overend v. Financial Corp. L. R.*, 7 H. L. 348; *Oakeley v. Paraheller*, 4 Cl. & Fr. 207; 10 Bligh, N. S. 548; *Maingay v. Lewis*, 5 Ir. Rep. C. L. 229, 231; *Rouse v. Banking Co.* (1894), App. Cas. 586.

assent to a new contract. And the chief justice, in *Swire v. Redman*,⁷³ says there is no English case which holds the doctrine that the agreement between partners themselves, without the consent of the creditor, can change their relation to the latter; and that he has found no American case that upholds such doctrine, except those based upon the misinterpretation of *Oakeley v. Parsheller*

§ 22. JOINT CONTRACT.—Where a joint contract is made by two or more parties for a joint debt, each is principal for his share of the debt and co-surety for the other part. Thus, where a note is signed by three persons as joint makers, each is principal for one-third of the debt and co-surety for the other two-thirds.⁷⁴ In such case there exists between the parties privity of contract, which arises between sureties and their principals. Between themselves each is principal for the performance of the contract so far as relates to himself, and surety for his co-principal that he will duly perform.⁷⁵

Where a joint and several note is given to a payee, the makers are jointly and severally bound for its entire amount; all are principal debtors. As between the makers, each is principal for his share, and is bound to pay it, and surety for the remainder.⁷⁶ Thus, where several parties borrow a sum of money which they share among themselves, and execute their joint note to the payee for the total amount, as between themselves, each is principal for the amount he receives, and surety as to the remainder.⁷⁷

§ 23. JOINT EXECUTORS AND ADMINISTRATORS.—The general rule is that a co-executor or administrator may act either separately or in conjunction. They are jointly responsible for joint acts, and each is separately answerable for his separate

⁷³ 1 Q. B. D. 536.

⁷⁴ *Goodall v. Wentworth*, 20 Me. 322.

⁷⁵ *Hatch v. Peyton*, 36 Me. 419.

⁷⁶ *Seitzler v. Mishler*, 37 Pa. St. 82; *Chapman v. Morrill*, 20 Cal. 130; *Fletcher v. Grover*, 11 N. H. 368; *Owen v. McGehee*, 61 Ala. 440.

⁷⁷ *Bank v. Close*, 76 Tex. 47; *Hall v. Hall*, 34 Ind. 314.

act and defaults.⁷⁸ In some States, however, the rule is different, and an executor or administrator is liable for the defaults of his co-executor or co-administrator.⁷⁹ But these cases were decided upon questions of liability outside of the bond.

⁷⁸ *Bruen v. Gillet*, 115 N. Y. 10; *Nauz v. Oakley*, 120 N. Y. 84; *State v. Wyant*, 67 Ind. 25.

⁷⁹ *Brazier v. Clark*, 5 Pick. 96; *Towne v. Ammidown*, 20 Pick. 535; *Newton v. Newton*, 53 N. H. 537; *Ames v. Armstrong*, 106 Mass. 15; *Boyd v. Boyd*, 1 Watts, 365; *Caskie v. Harrison*, 76 Va. 85; *Jeffries v. Lawson*, 39 Miss. 791; *Babcock v. Hubbard*, 2 Conn. 536.

CHAPTER II.

THE PARTIES.

SEC. 24. INFANTS.—An infant's liability as surety does not differ from his other business contracts. So a contract of a minor as surety is not necessarily void, but voidable, and he may affirm the contract upon reaching his majority.¹ This is the general rule, though the United States Supreme Court has lately decided that an infant's contract is voidable only, unless it appears upon its face to be to his prejudice, in which case it may be void.² But the decision on that point was not necessary and must be considered a dictum.

A contract of surety by an infant is voidable only, and may be affirmed by him when he arrives at his legal majority, and then if affirmed it may be enforced.³

§ 25. INSANE PERSONS.—The general doctrine is that contracts of insane persons are not binding in law or equity.⁴ But to this there should be a qualification: A contract made by an insane person before he is adjudged insane is not void, but voidable only.⁵

In Iowa it is held that a person of unsound mind who becomes surety on a note for an antecedent debt, is not liable thereon, even though the person taking the note had no knowledge that the surety's mind was unsound.⁶

¹ *Owen v. Long*, 112 Mass. 403.

² *MacGreal v. Taylor*, 167 U. S. 688.

³ *Fetrow v. Wiseman*, 40 Ind. 148; *Hinely v. Magoritz*, 3 Pl. St. 428; *Patchin v. Cromach*, 13 Vt. 330; *Reed v. Lane*, 61 Vt. 481; *Horner v. Dipple*, 31 Ohic St. 72. See, also, *Keil v. Healey*, 84 Ill. 104; *Cole v. Pennoyer*, 14 Ill. 158; *Fonda v. Van Horne*, 15 Wend. 631.

⁴ *Seavers v. Phelps*, 11 Pick. 304.

⁵ *Burnham v. Kidwell*, 113 Ill. 425; *Somers v. Pumphrey*, 24 Ind. 231; *Ingraham v. Baldwin*, 9 N. Y. 45.

⁶ *Van Patton v. Beals*, 46 Iowa, 62.

The same rules apply to a surety who is insane as to his other contracts.

§ 26. **PARTNERSHIP.**—The law is well settled that a partner has no authority by virtue of the partnership relation to sign the firm's name for any purpose not embraced in the partnership business; so he cannot, without express authority from his firm, bind it as guarantor or surety, if such transaction is not within the course of partnership dealings.⁷

But when one partner has signed the firm name as surety without authority, this liability may be ratified by the firm thereby making it valid.⁸

§ 27. **ATTORNEYS-AT-LAW—SURETY FOR THEIR CLIENTS—STATUTORY PROHIBITION.**—In many of the States it is declared by statute that an attorney-at-law shall not become surety for his client, but if he does become surety, he will be liable.⁹ So if a judge become surety on an official bond, which action is contrary to statute, yet he will be bound, as such statutes are only directory.¹⁰

In Wisconsin an attorney does not become liable when he becomes surety for his client, contrary to statute.¹¹ In the absence of statutory provisions an attorney may legally become a surety for his client.¹²

The rule of court prohibiting attorneys from being sureties

⁷ *Davis v. Blackwell*, 5 Ill. App. 32; *Marsh v. Bank*, 2 Ill. App. 217; *Brettel v. Williams*, 4 Exch. 623; *Sweetzer v. French*, 2 Cush. 309; *Osborne v. Stone*, 30 Minn. 25; *Avery v. Rowell*, 59 Wis. 82; *McQuewans v. Hamlin*, 35 Pa. St. 517.

⁸ *Crawford v. Stirling* 4 Esp. 207.

⁹ *Gilbank v. Stephenson*, 30 Wis. 155; *Towle v. Bradley*, 2 S. Dak. 472; *Cuppy v. Coffman*, 82 Iowa, 214; *Wright v. Schmidt*, 47 Iowa, 233. See, also, *Jack v. People*, 19 Ill. 57.

¹⁰ *State v. Howell County*, 101 Mo. 368; *Wallace v. Scoles*, 6 Ohio, 429; *Sherman v. State*, 4 Kan. 570; *Tessier v. Crowley*, 17 Neb. 207; *Hicks v. Chouteau*, 12 Mo. 341; *Ohio, etc., R. R. Co. v. Hardy*, 64 Ind. 454; *Harper v. Tahourdin*, 6 M. and Sel. 383.

¹¹ *Cothren v. Connaughton*, 24 Wis. 134; *Gilback v. Stephenson*, 30 Wis. 155. See, also, *Fond du Lac v. Moore*, 58 Wis. 170.

¹² *Walker v. Holmes*, 22 Wend. 614; *Abbott v. Zeigler*, 9 Ind. 511.

for their clients in a legal proceeding extends only to bail for the appearance of the parties arrested, and does not apply to their being surety for costs.¹³ If the attorney becomes surety in violation of the statute or rule of court, it does not relieve him of liability as a surety, because he cannot take advantage of his own wrong when sued upon the undertaking.¹⁴ But the proceedings may be dismissed when the statute or rule of court has been violated,¹⁵ or the court may hold the attorney in contempt of court when in opposition to rule,¹⁶ or the court may allow the bond to be amended and made sufficient.¹⁷

§ 28. CORPORATIONS.—The general rule is that a corporation has those rights to contract which are given it by its charter, or act of creation. A private corporation may borrow money, and become a party to negotiable paper in the transaction of its legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that its acts in that behalf are done in the regular course of its business.¹⁸ So a railroad corporation is responsible in its corporate capacity for acts done by its agent, either *ex contractu* or *ex delicto*, in the course of its business and within the scope of the agent's authority.¹⁹ Corporations, as much as individuals, are bound to act in good faith and fair dealing, and the rule is well settled that they cannot, by acts, representations or silence, involve others in onerous engagements and then turn round and disavow their acts and defeat just obligations which their own conduct has

¹³ Jones v. Savage, 10 Daly, 621; Sigourney v. Waddle, 9 Paige, 381; Coater v. Watson, 15 Johns. 535. See, also, Stark v. Small, 72 Wis. 215.

¹⁴ Jack v. People, 19 Ill. 57; Tessier v. Crowley, 17 Neb. 207; Ohio, etc., R. R. Co. v. Hardy, 64 Ind. 454; Wright v. Schmidt, 47 Iowa, 233; Cook v. Caroway, 29 Kan. 41; Morrill v. Lamson, 138 Mass. 115; Holandworth v. Commonwealth, 11 Bush, 617; Wallace v. Scoles, 6 Ohio, 429; Fond du Lac v. Moore, 58 Wis. 170.

¹⁵ Gilbank v. Stephenson, 30 Wis. 155; Massie v. Mann, 17 Iowa, 131; Love v. Shiffelin, 7 Fla. 40.

¹⁶ Abbott v. Zeigler, 9 Ind. 511; Ohio, etc., R. R. Co. v. Hardy, 6 Ohio, 455.

¹⁷ Branger v. Buttrick, 30 Wis. 153.

¹⁸ Canal Co. v. Vallette, 21 How. 424; Farnum v. Blackston, 1 Sumner, 46.

¹⁹ Railroad Co. v. Quigley, 21 How. 202.

superinduced.²⁰ So when a State gives a railroad corporation power to guarantee bonds issued by towns and cities along the line for the benefit of the road, such guaranty is valid.²¹ But unless the corporation has legal authority to guarantee such bonds, or to guarantee future dividends, such action by the corporation will be *ultra vires*, and is invalid.²²

Ordinarily the simple act of becoming a surety or guarantor for the contract debt of a person or corporation is not within the implied powers of a corporation.²³

§ 29. NATIONAL BANKS.—National banks possess only such powers as are expressly conferred upon them by the act of Congress under which they are organized, and no power is given them to enter into contracts of surety in which they have no interest.²⁴ Thus, a national bank has no legal power to guarantee a contract between third persons for the delivery of building material.²⁵ But when it is in the course of its ordinary business, it may guarantee payment of a note which it indorses for the purpose of transfer.²⁶ But a bank cannot as such become a surety upon a bond, and cannot have any understanding or make a contract except as its proper officers shall make the promise in the line of its powers; hence, sureties upon a public officer's bond executed in pursuance of an understanding that public funds

²⁰ *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Zabriskie v. Railroad Co.*, 23 How. 397.

²¹ *Railroad Co. v. Howard*, 7 Wall. 392.

²² *Elevator Co. v. Railroad Co.*, 85 Tenn. 703.

²³ *Pennsylvania, etc., R. R. Co. v. Railroad Co.*, 118 U. S. 290; *Twiss v. Association*, 87 Iowa, 733; *Knickerbocker v. Wilcox*, 83 Mich. 200; *Colman v. Railroad Co.*, 10 Beav. 1; *Culver v. Real Estate Co.*, 91 Pa. St. 376; *Madison, etc., Plank-road Co. v. Plank-road Co.*, 7 Wis. 59; *Northside R. R. Co. v. Worthington*, 88 Tex. 562; *Filon v. Brewing Co.*, 38 N. Y. St. Rep. 602; 15 N. Y. Supp. 57; *Norton v. Bank*, 61 N. H. 589; *Aetna Nat. Bank v. Ins. Co.*, 50 Conn. 167; *Louisville, etc., R. R. Co. v. Imp. R. R. Co.*, 69 Fed. Rep. 433; *Best Brewing Co. v. Klassen*, 185 Ill. 37; *Lucas v. Transfer Co.*, 70 Iowa, 541.

²⁴ *Bullard v. Bank*, 18 Wall. 589; *Matthews v. Skinker*, 62 Mo. 329; *Wiley v. Bank*, 47 Vt. 546; *Bank v. Hoch*, 89 Pa. St. 324; *Knickerbocker v. Wilcox*, 83 Mich. 200.

²⁵ *Norton v. Bank*, 51 N. H. 589.

²⁶ *People's Bank v. Bank*, 101 U. S. 181.

would be deposited in the bank represented by them and interest be paid thereon to the officer, are parties to such illegal arrangement, which cannot be treated as having been made with the bank as a corporate entity, so as to leave the sureties untainted with the transaction, and its illegality will prevent them from enforcing under such contract indemnity against the defaulting principal.²⁷

§ 30. *ULTRA VIRES CONTRACTS*.—Executory contracts of corporations to act as sureties are void.²⁸ But some decisions hold that a corporation may become a surety and the contract enforced if it results in increasing the trade or business of the corporation, and is incident to the scope of its business.²⁹ Thus, a brewery company may guarantee the payment of rent of a hotel, the bar fixtures and furniture of which it owns, and in which its beer is to be sold to the trade.³⁰ And so a lumber company may become surety for a contractor who agrees to buy his lumber from it.³¹ And it is held that an executed contract cannot be avoided for *ultra vires* when the corporation has received the benefits of the contract. So after the contract is executed the corporation cannot allege its suretyship as an *ultra vires* contract and, therefore, void.³²

However, this general rule has qualifications. A contract of a corporation which is *ultra vires* in the proper sense, that is, outside of the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. Because the objection to the contract is not merely that the corporation ought not to have made it, but

²⁷ Ramsay v. Whitbeck, 183 Ill. 550.

²⁸ First Nat. Bank v. Winchester, 119 Ala. 168; Twiss v. Life Association, 87 Iowa, 733; Culver v. Real Estate Co., 91 Pa. St. 367; Hardaway v. Hynson, 89 Md. 305.

²⁹ Heim's Brewing Co. v. Flannery, 137 Ill. 309; Standard Brewery Co. v. Kelly, 66 Ill. App. 267; Field v. Burr Brewing Co., 18 N. Y. Supp. 456.

³⁰ Winterfield v. Brewing Co., 96 Wis. 239.

³¹ Wittmer v. Lumber Co. (Ind.), 55 N. E. Rep. 868.

³² Kadish v. Build. Asso., 151 Ill. 531; Arkansas Valley, etc., Co. v. Lincoln, 56 Kan. 145; Wittmer v. Lumber Co. (Ind.), 55 N. E. Rep. 868.

that it could not make it. Such contract cannot be ratified by either party because it could not have been authorized by either. No performance on either side can give the said contract any validity or be the foundation of any right of action upon it. When a corporation is acting within the general scope of its powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are requisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the power conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it or by acting upon it, to show that it was prohibited by those laws, for the contract is void.³³ And the party receiving the benefits may be compelled to restore what he has received or pay a compensation on implied contract, and not on the original contract, which is void absolutely.³⁴

§ 31. IMPLIED POWER TO BECOME SURETY.—A power will be implied that a corporation may become surety whenever reasonably necessary or is usual in the conduct of its business, or reasonably necessary or proper in order to accomplish any particular power expressly conferred.³⁵ Thus, a national bank may give a guaranty for the payment of a note which it indorses in order to transfer the same to other parties, as such action is incidental to the exercise of its power to buy and sell commercial paper.³⁶

§ 32. PRINCIPAL UNDER DURESS.—If the principal is under duress at the time of making a contract, it may be avoided by

³³ *Davis v. Railroad Co.*, 131 Mass. 258; *Central Trans. Co. v. Car Co.*, 139 U. S. 24; *Durkel v. People*, 155 Ill. 354; *Best Brewing Co. v. Klasson*, 185 Ill. 37; *National Home Build. Asso. v. Bank*, 181 Ill. 35; *Marble v. Harvey*, 92 Tenn. 115.

³⁴ *Salt Lake City v. Hollister*, 118 U. S. 256, 263.

³⁵ *Green Bay, etc., R. R. Co. v. Steamboat Co.*, 107 U. S. 98; *Arnot v. Railroad Co.*, 67 N. Y. 315; *Heim's Brewing Co. v. Flannery*, 137 Ill. 309; *Smead v. Railroad Co.*, 11 Ind. 104.

³⁶ *Thomas v. Bank*, 40 Neb. 501; *People's Bank v. Bank*, 101 U. S. 181.

him. And if the contract of suretyship is executed by the surety under duress he will not be bound.³⁷ But the general rule is that the surety cannot set up the duress of his principal to relieve him from liability as surety when he signed with full knowledge of the duress.³⁸ Because duress which will avoid a contract must be pleaded by the party who acted under it in making the contract.³⁹ But there are decisions to the contrary which hold that a surety may avoid the contract on account of the duress of the principal.⁴⁰

In one case the defense of duress in the execution of a note was allowed to the surety because he was the father of the principal.⁴¹

Where the surety is ignorant of the duress of the principal he will not be liable, because then he becomes surety on a contract which was not in contemplation at the time of its execution.⁴² But where he has full knowledge of the facts, duress of the principal does not release him from liability.⁴³

§ 33. NON-RESIDENTS.—Where the statute provides that sureties shall be residents of the State or county where the contract is executed, the statute is directory, and the non-resident surety will be held responsible, and he cannot set up his foreign domicile to release him of liability.⁴⁴

§ 34. SURETY AND GUARANTY COMPANIES.—At the present time many States have enacted laws for the organization of surety and guaranty corporations, which can become surety, and

³⁷ *Small v. Currie*, 2 Drew. 102; *Ingersoll v. Roe*, 65 Barb. 346.

³⁸ *Plummer v. People*, 16 Ill. 358; *Peacock v. People*, 83 Ill. 331; *Tucker v. State*, 72 Ind. 242; *Haney v. People*, 12 Colo. 345.

³⁹ *Robinson v. Gould*, 11 Cush. 55, 57.

⁴⁰ *Wilkinson v. Herd*, 65 Mo. App. 491; *State v. Brantley*, 27 Ala. 44; *Hawes v. Marchant*, 1 Curt. 136; *Owens v. Mynatt*, 1 Heisk. 675.

⁴¹ *Osborn v. Robbins*, 36 N. Y. 365. Compare *Strong v. Grannis*, 26 Barb. 122; *Gibson v. Patterson*, 75 Ga. 549.

⁴² *Graham v. Marks*, 98 Ga. 67; *Griffith v. Sitgreaves*, 90 Pa. St. 161; *Hazard v. Griswold*, 21 Fed. Rep. 178.

⁴³ *Plummer v. People*, 16 Ill. 358; *Tucker v. State*, 72 Ind. 242.

⁴⁴ *State v. Flinn*, 77 Ala. 100; *School Directors v. Brown*, 33 La. Ann. 383.

such corporations are constitutional.⁴⁵ Such corporations may be accepted as sole surety,⁴⁶ and the grant of such power to a corporation to become the sole surety, in no manner interferes with the general law in regard to personal security.⁴⁷

⁴⁵ *Cramer v. Tittle*, 72 Cal. 12; *Gans v. Carter*, 77 Md. 1; *Steele v. Auditor General*, 111 Mich. 381.

⁴⁶ *Cramer v. Tittle*, 72 Cal. 12.

⁴⁷ *County Commissioners v. Hellen*, 72 Md. 603.

CHAPTER III.

EXECUTION OF THE CONTRACT.

SEC. 35. CONSIDERATION.—A contract of surety differs in no respect from other contracts, and must be supported by a sufficient consideration.¹ The consideration may be some benefit or advantage to the principal or surety or some disadvantage. What is a sufficient consideration to support a promise of the principal will sustain the concurrent promise of the surety.² So an extension of the time of payment is a sufficient consideration for the promise of a third party, as surety, to pay the debt.³ And if the surety agreed to such extension he is bound, and his consent may be implied.⁴ After the surety is released, he may, without any new consideration, revive his liability by a new and distinct promise if not contrary to statute;⁵ and especially so if the new promise be in writing.⁶

If the contract is void the surety is not liable. Thus, where a corporation becomes a surety, which is *ultra vires* and void, it cannot be held liable, and if it had given a mortgage the land does not pass, but the title still remains in the corporation.⁷

As between the sureties and the principal, the consideration which supports the undertaking of the sureties is the implied promise of the principal to indemnify them for becoming parties to the obligation.⁸

¹ Biggs v. Latham, 36 Kan. 205; Post v. Lossy, 111 Ind. 74.

² Pritchett v. People, 1 Gil. (Ill.) 525; United States v. Linn, 15 Pet. 290; Leonard v. Vredenburg, 8 Johns. 29.

³ Hooper v. Pike, 70 Minn. 84.

⁴ Bank v. Whitman, 66 Ill. 331; Clark v. Devlin, 3 Bos. & Pul. 363.

⁵ Hooper v. Pike, 70 Minn. 84; Bank v. Whitman, 66 Ill. 331.

⁶ Smith v. Winter, 4 Mees. & W. 454; Stevens v. Lynch, 12 East. 48; Fowler v. Brooks, 13 N. H. 240; Bramble v. Ward, 40 Ohio St. 267.

⁷ First Nat. Bank v. Winchester, 119 Ala. 168.

⁸ Appleton v. Bascom, 3 Met. 169; Martin v. Ellerbe, 70 Ala. 326; Miller v. Stout, 5 Del. Ch. 263; Howe v. Ward, 4 Me. 195; Thompson v. Thompson, 19 Me. 244; Morrow v. Morrow, 2 Tenn. Ch. 555.

§ 36. **INDORSING NOTE BEFORE AND AFTER EXECUTION.**—A guarantor or surety indorsing a note before its delivery to the payee, needs no new consideration to support such suretyship, because his and the principal's contract were concurrent and simultaneous.⁹ Such indorsement becomes and is a part of the original contract, and therefore needs no new consideration.¹⁰

If the undertaking of suretyship is entered into at a time subsequent to the execution by the principal, it is a distinct contract and must be supported by a consideration of its own.¹¹ So where a surety signs a note as surety, after its delivery to the payee, the transaction must be supported by a new consideration in order to hold the surety.¹² Thus, where a note has been executed by the principal, a party signing it as surety at a time subsequent to the incurring of the obligation, without any new or distinct consideration passing to the surety, is not bound.¹³

§ 37. **SURRENDER OF OLD NOTE FOR NEW NOTE.**—A surrender of the old promissory note is a sufficient consideration for a new one executed by the surety and principal, although the surety had been released from payment of the old note by the action of the principal.¹⁴ So giving up a note against a third person, is a sufficient consideration for a promise to pay the amount of it.¹⁵ And where both principal and surety are ignorant of the law, in good faith, supposed the surety was liable for the old note, the surety is liable on the new note, though he had been discharged on the old note.¹⁶

⁹ Dillman v. Nadelhoffer, 160 Ill. 121. See sec. 347.

¹⁰ Joslyn v. Collinson, 26 Ill. 61; Favorite v. Stidham, 84 Ind. 423; Bridges v. Blake, 106 Ind. 332; Green v. Shepherd, 5 Allen, 589; Briggs v. Downing, 48 Iowa, 550; Barnes v. Van Keuren, 31 Neb. 165; Brownlee v. Lowe, 117 Ind. 420.

¹¹ Bebee v. Moore, 3 McLean, 387.

¹² Clofton v. Hall, 51 Miss. 482; Savage v. Bank, 112 Ala. 508; Joslyn v. Collinson, 26 Ill. 61.

¹³ Whippman v. Hardy, 17 Ind. App. 142; Joslyn v. Collinson, 26 Ill. 61; Lowenstein v. Sorge, 75 Mo. App. 281. See sec. 347.

¹⁴ Stevens v. Lynch, 12 East, 38.

¹⁵ Shortrede v. Cheek, 1 A. & E. 57; Brewster v. Baker, 97 Ind. 260; Erie County Sav. Bank v. Coit, 104 N. Y. 532.

¹⁶ Churchill v. Bradley, 58 Vt. 403. This is on the principle that ignorance of the law excuses no one.

§ 38. THE CONSIDERATION MUST BE LEGAL.—The consideration must be legal and, of course, not opposed to public policy. Thus, a note signed by one as surety upon the promise that the maker thereof would not be prosecuted for embezzlement, being based upon an illegal consideration, is void.¹⁷ But if the principal's debt is based upon an illegal consideration, the delivery of the money due upon the contract, to the surety to be paid to the payee, and he agrees thus to pay the note upon which he is surety—make the surety liable to pay the money as agreed, though the original contract was illegal.¹⁸

§ 39. CONCURRENT CONTRACTS.—In order to bind the surety, the general rule is that his contract must be concurrent with the principal's. So when the surety's contract is contemporaneous with the principal contract, it is not necessary that there should be a separate and distinct consideration from that upon which the bill or promissory note was executed.¹⁹ And if the consideration is sufficient to support the principal contract, it will be sufficient to support the contract of suretyship.²⁰

So if a party signs as a guarantor or surety, a note before its delivery to the payee, the consideration of the note will be presumed to be the consideration of the suretyship.²¹

The question of consideration in cases of suretyship may be divided into four classes: (1) Cases in which the promise of the surety is collateral to the principal contract, but is made at the same time and becomes an essential ground of the suretyship given to the principal debtor. Hence, there is no need of any other consideration to support the contract of suretyship.²² (2) Cases in which collateral undertaking is subsequent to the

¹⁷ *Rouse v. Mohr*, 29 Ill. App. 321; *Gorham v. Keyes*, 137 Mass. 583; *Board v. Thompson*, 33 Ohio St. 321.

¹⁸ *Barker v. Parker*, 23 Ark. 390. See *Farmer v. Russell*, 1 Bos. & Pul. 296; *Armstrong v. Toler*, 11 Wheat. 258.

¹⁹ *Bickford v. Gibbs*, 8 Cush. 154; *Hughes v. Littlefield*, 18 Me. 400; *McNaught v. McClaughry*, 42 N. Y. 22; *Swift v. Tyson*, 16 Pet. 1.

²⁰ *Savage v. Fox*, 60 N. H. 17.

²¹ *Parkhurst v. Vail*, 73 Ill. 343; *Dillman v. Nadelhoffer*, 160 Ill. 121; *Moies v. Bird*, 11 Mass. 436.

²² *Bickford v. Gibbs*, 8 Cush. 154; *Dillman v. Nadelhoffer*, 160 Ill. 121.

creation of the debt and is not an inducement to it, though the subsisting liability is the ground of the promise, without a distinct or unconnected inducement; therefore there must be a further consideration, having an immediate respect to such liability for the consideration of the original debt will not attach to this subsequent promise.²³ (3) Cases where the promise to pay a debt of another arises out of a new and original consideration, of benefit or harm moving between the contracting parties; so when the surety subsequently signs the instrument after delivery, he will be bound if he receives a new and sufficient consideration for his act.²⁴ (4) Cases where the surety's promise is the inducement of completing the contract, though he signs subsequently to the execution.²⁵

These four classes of cases cover the law with respect to a surety's liability.

§ 40. SURETY'S PROMISE BEING THE INDUCEMENT.—A moral obligation is not sufficient to support a contract of suretyship; but when the contract has been entered into at the request of the surety, the consideration of his promise, though passed or executed, will be continuing and valuable, and when he signs, as surety, the contract, it is a complete and full execution of the promise upon that consideration. Because the signature connected with the original contract constitutes one entire contract, and the surety is bound.²⁶

A consideration which is executed is not sufficient to support a subsequent promise, unless the act was done at the request of the party promising, for then the promise is not a naked one, but couples itself with the precedent request, and is therefore founded on a sufficient consideration. The general rule is that a passed or executed consideration is not sufficient to sustain a promise founded upon it, unless the consideration, though passed,

²³ *Parkhurst v. Vail*, 73 Ill. 343; *Fish v. Hutchinson*, 2 Wils. 94; *Charter v. Beckett*, 7 Term R. 201; *Wain v. Walters*, 5 East, 10.

²⁴ *Leonard v. Vredenbergh*, 8 Johns. 29.

²⁵ *Jackson v. Jackson*, 7 Ala. 791; *Russell v. Mosley*, 3 Brod. & B. 211.

²⁶ *Paul v. Stackhouse*, 38 Pa. St. 302; *Lackey v. Boruff*, 152 Ind. 371.

was done or performed at the request of the party promising. Without such previous request, a subsequent promise has no legal validity; because the consideration being entirely completed and exhausted, it cannot be said that it would not have been made or given but for the promise which is subsequent and independent. But where the consideration and the promise founded upon it, are simultaneous, and the whole agreement is completed at once; and where the consideration is to do a thing in the future, the promise rests on a sufficient foundation, and it binds the party who makes it.²⁷ Thus, if one loans money to another, and at a subsequent time a third party who did not request the loan, and is not benefited by it, promises to see that it is paid, his promise is void because no consideration passes from the promisee to him. But if the promisor requests the loan, or if his promise is made previous to the loan, or at the same time, then it will be supposed that the loan is made because of the promise, which is a sufficient consideration to bind the third party or surety.²⁸ The consideration must be at the time the promise is made, either wholly or in part executory, in order to bind the third party who agrees to pay the debt.²⁹

§ 41. EXECUTED CONTRACT.—Where the consideration is wholly executed and no part of it is executory, and runs only to the principal, a subsequent promise by a third party is void.³⁰ Hence, where a note has already been executed and delivered, and then a third party signs as surety, there must be a new consideration to sustain the surety's promise. If there be no new consideration in such case the surety will not be liable.³¹ So where a collateral undertaking of a guarantor or surety is subsequent

²⁷ *Williams v. Perkins*, 21 Ark. 18.

²⁸ *Jackson v. Jackson*, 7 Ala. 791; *Payne v. Wilson*, 1 Man. & Ry. 708; *Bailey v. Croft*, 4 Taunt. 611; *Morley v. Boothby*, 10 J. B. Moore, 395; *Russell v. Mosley*, 3 Brod. & B. 211.

²⁹ *Bank v. Coster*, 3 N. Y. 202.

³⁰ *Coffin v. University*, 92 Ind. 337; *Wells v. Ross*, 77 Ind. 1; *Underwood v. Hossack*, 38 Ill. 208.

³¹ *Thompson v. Gray*, 63 Me. 228; *Lee v. Wisner*, 38 Mich. 82; *Fuller v. Scott*, 8 Kan. 25.

to the creation of the debt, and is not the inducement leading to the formation of the contract, although the consideration need not be expressed in writing, yet there must be some consideration shown having an immediate respect to such liability,³² for such subsequent surety or guaranty requires a distinct consideration to support such engagement.³³

§ 42. EXTENSION OF TIME—PROMISE OF THIRD PERSON TO PAY.—A promise to forbear the collection of a pre-existing debt, will be no consideration for the promise of a third person to pay it, unless it be shown that such forbearance was actually granted upon the faith of such third person's promise.³⁴ So the suspension of the right of the creditor to enforce payment of his debt to a future date is a sufficient consideration for the promise of a third person to pay it.³⁵ And so where one has the property of a debtor under his control, executes a promissory note at the debtor's request payable to one of the latter's creditors, which is accepted by such creditor in satisfaction of his debt, the note is based upon sufficient consideration.³⁶ And so an agreement to extend the time of payment of a debt is a sufficient consideration for the execution by a third party of his note to the creditor as collateral security for the payment of such debt.³⁷

§ 43. AGREEMENT TO FORBEAR FOR AN INDEFINITE TIME.—An agreement to forbear for an indefinite time, and actual forbearance for a reasonable time, is a sufficient consideration for the surety's undertaking. If no specific time is fixed by the agreement of the parties, the law presumes that a reasonable time was intended.³⁸ So the taking of a new security payable

³² *Harris v. Harris*, 180 Ill. 157.

³³ *Nichols v. Didrick*, 61 Minn. 513; *Lowenstein v. Sorge*, 75 Mo. App. 281.

³⁴ *Jackson v. Jackson*, 7 Ala. 791; *Harwood v. Kiersted*, 20 Ill. App. 367; *Savage v. Bank*, 112 Ala. 508.

³⁵ *Kansas Mfg. Co. v. Gandy*, 11 Neb. 448; *Barnes v. Van Keuren*, 31 Neb. 165; *Pratt v. Hedden*, 121 Mass. 116.

³⁶ *Clune v. Ford*, 55 Hun. 479; *Moies v. Bird*, 11 Mass. 436; *Jaffray v. Brown*, 75 N. Y. 393.

³⁷ *Pratt v. Hedden*, 121 Mass. 113. See secs. 113 *et seq.*, 363 *et seq.*

³⁸ *Moore v. McKinney*, 83 Me. 80; *Howe v. Taggart*, 133 Mass. 284; *Coles v. Pack*, L. R. 5 C. P. 65; *Elton v. Johnson*, 16 Conn. 253.

at a future date, by operation of law and without any specific agreement to that effect, imposes on the creditor the duty of waiting for his pay until the new security matures.³⁹

§ 44. **AN AGREEMENT MUST BE MADE TO FORBEAR.**—A promise to pay the debt of another, although in writing, is not enforceable, unless founded upon a consideration. Thus, where a promise is to pay an overdue debt, mere forbearance without agreement to that effect, is not a consideration.⁴⁰ There must be an acceptance of the offer to answer for the debt of another in consideration of forbearance, in order to complete the contract.⁴¹ Thus, mere forbearance to sue the maker of a note, without any agreement to that effect on the part of the holder, is not a sufficient consideration.⁴² But actual forbearance to sue on a note, in connection with other facts, may be evidence of an agreement to forbear, and as such forms a sufficient consideration.⁴³

§ 45. **OFFER TO BECOME SURETY FOR ANOTHER.**—A person proposing to become a surety for another, is not bound to inquire as to the acceptance of his offer. The creditor who intends to hold him must show reasonable notice of such intention. Where ever one offers his name with that of others as surety to whomsoever may accept the proposal, he is entitled to notice of the acceptance, and is not obligated to make inquiries on that point.⁴⁴ The reason of this rule is, that the surety may have the opportunity of arranging his relations with the party for whose benefit or in whose favor the surety is given.⁴⁵ But where the agreement to accept is contemporaneous with the guaranty or suretyship, and is the consideration therefor, and all the parties being

³⁹ *Andrews v. Morrett*, 53 Me. 589; *Kisner v. Pullen*, 3 Daly, 435.

⁴⁰ *Hess's Estate*, 150 Pa. St. 346; *United States v. Linn*, 15 Pet. 290; *Rumberger v. Golden*, 99 Pa. St. 34.

⁴¹ *Clark v. Russell*, 3 Watts, 213.

⁴² *Mecorney v. Stanley*, 8 Cush. 85; *Breed v. Hillhouse*, 7 Conn. 523.

⁴³ *Walker v. Sherman*, 11 Met. 170; *Breed v. Hillhouse*, 7 Conn. 523.

⁴⁴ *Steadham v. Guthrie*, 4 Met. (Ky.) 147; *Douglas v. Reynolds*, 7 Pet. 113.

⁴⁵ *Thompson v. Glover*, 78 Ky. 193; *Howe v. Nichols*, 22 Me. 175.

privity to the whole transaction, no specific notice of acceptance is necessary.⁴⁶

§ 46. **EXTENSION OF TIME—AGREEMENT TO PAY INTEREST.**—Where the interest is paid in advance, or any part of it, this is a sufficient consideration for the forbearance. But another question arises whether a bare promise to pay interest during a fixed period of extension stipulated for is a sufficient consideration. The weight of authority is that such an agreement is a valuable consideration. It is a valuable right on the part of the creditor to have his money placed out at interest, and it is a valuable right on the part of the debtor to have the privilege at any time of getting rid of the payment of interest by discharging the debt. By this contract of extension the right to interest is secured for a given period, and the right to pay off the debt and get rid of paying interest is also relinquished for such period. The creditor relinquishes his right to demand immediate payment and converts the debt into an immatured, interest-bearing security, and the debtor relinquishes his right to make immediate payment and binds himself to pay interest for the time specified, in consideration of such extension on the part of the creditor.⁴⁷ So the promise of the holder of a note to grant an extension of the time for its payment, for a certain period, after maturity, in consideration of the promise of the maker to pay interest thereon at a stipulated rate for such period, constitutes a valid and binding agreement upon a sufficient consideration, notwithstanding the rate of interest so agreed to be paid is less than that named in the note. The maker thus assumes an obligation, not before imposed upon him, and the holder of the note acquires an additional substantial right—that of refusing payment and exacting interest for the full period of the extension.

⁴⁶ *Wildes v. Savage*, 1 Story, 22; *Bleeker v. Hyde*, 3 McLean, 279.

⁴⁷ *Parsons v. Harrold* (W. Va.), 32 S. E. Rep. 1002; *Wood v. Newkirk*, 15 Ohio St. 297; *Chute v. Patte*, 37 Me. 102; *Stallings v. Johnson*, 27 Ga. 564; *Fowler v. Brooks*, 13 N. H. 240; *Robinson v. Miller*, 2 Bush, 192; *Stone River Nat. Bank v. Walter* (Tenn.), 55 S. W. Rep. 301; *Dodgson v. Henderson*, 113 Ill. 361; *Benson v. Phipps*, 87 Tex. 578; *McComb v. Kittridge*, 14 Ohio, 348.

Such mutual promises are a sufficient consideration each for the other,⁴⁸ if on no other consideration. In such case, however, it is essential that there be a definite and express promise on the part of the maker of the note to pay interest for the stipulated time. A mere promise or offer on the part of the one to whom payment is due to give further time, without a positive agreement on the part of the debtor to pay interest for such time, is a promise without consideration to support it. It is a mere *nudum pactum*, and does not change the legal relations of the parties.⁴⁹ And so a mere payment of interest in advance does not discharge the surety.⁵⁰

§ 47. BOTH PARTIES MUST BE BOUND.—It is essential in such extension that both parties shall be bound by the agreement, or that it shall be mutual. Hence, a mere indorsement by a creditor upon a note, that the time of payment is extended to a given day, and that interest has been paid to such date at the same rate specified in the note, without any proof or showing that the interest was in advance, there being no date to such indorsement and no evidence that the debtor bound himself to keep the money or pay interest for the time of such extension—shows no contract or agreement by the debtor to such arrangement. It is essential that both parties shall be bound by the agreement, or that the agreement be mutual.⁵¹ And consideration for the extension of payment must be something more than the mere doing or promise to do something by the debtor which was obligatory upon him by the original contract.⁵² It is immaterial what rate of interest is to be paid during the period of extension, provided it is not a rate prohibited by law. It may be the rate stipulated in the original contract, or a different rate. The

⁴⁸ *Bailey v. Adams*, 10 N. H. 162; *English v. Landon*, 181 Ill. 614; *Fawcett v. Freshwater*, 31 Ohio St. 637; *Crossman v. Wohleleben*, 90 Ill. 537; *Moore v. Redding*, 69 Miss. 841; *Wood v. Newkirk*, 15 Ohio St. 295.

⁴⁹ *Fulton v. Matthews*, 15 Johns. 433; *Bailey v. Adams*, 10 N. H. 162; *Ingles v. Sutliff*, 36 Kan. 444.

⁵⁰ *Morse v. Blanchard*, 117 Mich. 37.

⁵¹ *Crossman v. Wohleleben*, 90 Ill. 537.

⁵² *Ingles v. Sutliff*, 36 Kan. 444.

right of the debtor to have the use of the money for any defined time, and the right of the creditor to get interest at any given rate for such period are alike valuable in law, and will support the mutual promise—that of the creditor to forbear and that of the debtor to retain the money and pay interest.⁵³ A mere promise by the creditor to forbear without any promise on the part of the debtor not to pay the debt during the time of the promise to forbear, lacks mutuality, and therefore no contract arises. And some courts hold that an express promise to pay interest for the time is not necessary, and that such an agreement of extension had all the essentials of a valid contract.⁵⁴ All the courts hold that the time must be definite.

§ 48. EXTENSION OF TIME BY PAYING INTEREST—CONTRARY DOCTRINE.—Another line of authorities hold a contrary doctrine. It is argued that as the debtor has already impliedly bound himself to continue to pay interest in case of non-payment at maturity, the new promise to pay interest during the fixed period of extension is without consideration. The creditor receives no benefit from the new promise, because the debtor is already bound to the same extent by his original promise.⁵⁵

§ 49. DELIVERY OF CONTRACT.—A contract of surety is not complete until delivery of the instrument creating it. The contract is not executed until delivery, and it takes effect only from execution and delivery.⁵⁶ Thus a bond signed on Sunday and delivered on a secular day, is not executed until delivered, and, hence, the signing on Sunday did not invalidate it.⁵⁷ How-

⁵³ Moore v. Redding, 69 Miss. 841.

⁵⁴ Nelson v. Flagg, 18 Wash. 39.

⁵⁵ Kellogg v. Olmsted, 25 N. Y. 189; Reynolds v. Ward, 5 Wend. 501; Wilson v. Powers, 130 Mass. 427; Abel v. Alexander, 45 Ind. 523; Rumberger v. Golden, 99 Pa. St. 34; Hunt v. Postlewait, 28 Iowa, 427; Draper v. Romeyn, 18 Barb. 166.

⁵⁶ Benjamin v. Ver Nooy, 36 App. Div. 581; Commonwealth v. Kendig, 2 Pa. St. 448; Bloxsom v. Williams, 3 B. & C. 232; Lovejoy v. Whipple, 18 Vt. 379; Hill v. Dunham, 7 Gray, 543; Hall v. Parker, 37 Mich. 590; State v. Young, 23 Minn. 551.

⁵⁷ State v. Young, 23 Minn. 551. See, also, Richmond v. Moore, 107 Ill. 429.

ever, in some States an instrument executed on Sunday is void, though delivered on a secular day.⁵⁸ A delivery to one of several obligees is a sufficient delivery; it is not necessary that all the obligees be present when the instrument is delivered.⁵⁹

The obligation of a surety is to the creditor or obligee, and not to the principal, and hence, the instrument is of no validity until after its delivery.⁶⁰

§ 50. DELIVERY IN ESCROW.—A deed cannot be delivered to the grantee in escrow; neither can a bond be delivered in escrow to the obligee. So if a bond is delivered to the obligee or his agent, and not to a stranger, the delivery is absolute, and parol evidence of conditions qualifying the delivery is inadmissible.⁶¹ But it is said that a deed may be delivered to a co-obligor in escrow or to the principal by the surety.⁶² This rule must be qualified, because there may be cases in which the obligor may, by his negligence, impart to the depositary of the instrument delivered in escrow, such an apparent right to deliver it in an unqualified form to the obligee, as to prevent the obligor from setting up the existence of a condition that was never complied with before the instrument became deliverable. Thus, a perfect bond on its face, executed by sureties and by them delivered in escrow to the principal obligor, and who delivered it in the ordinary course of business to the obligee, the delivery is absolute and valid; because the principal obligor had been clothed with an apparent right to transfer the bond without qualification, and as the obligee, receiving it in good faith, would be unavoidably deceived by such conduct, it must be considered a valid delivery.⁶³ Delivery to the obligee without notice of the

⁵⁸ *Parker v. Pitts*, 73 Ind. 597.

⁵⁹ *Moss v. Riddle*, 5 Cranch, 351.

⁶⁰ *Benjamin v. Ver Nooy*, 36 App. Div. 581.

⁶¹ *Worrall v. Munn*, 1 Seld. 229; *Cocks v. Barker*, 49 N. Y. 107; *Ordinary v. Thatcher*, 41 N. J. L. 403.

⁶² *State Bank v. Evans*, 15 N. J. L. 155.

⁶³ *Dair v. United States*, 16 Wall. 1; *Russell v. Freer*, 56 N. Y. 67; *Wolf v. Driggs*, 44 N. J. Eq. 363.

condition, or any circumstances to arouse his suspicion, makes the delivery valid, and the surety will be liable. Such obligee is considered an innocent holder for value.⁶⁴

§ 51. **WRONGFUL DELIVERY BY PRINCIPAL.**—The general rule as to the wrongful delivery of a bond by the principal, is this: A bond perfect upon its face, apparently duly executed by all whose names appear therein, purporting to be signed by the several obligors and actually delivered by the principal without stipulation, reservation or condition—cannot be avoided by the sureties upon the ground that they signed it on condition that it should not be delivered unless it should be executed by other persons who did not execute it, when the obligee receives it in good faith, or is an innocent party.⁶⁵

But if the obligee has notice of such facts as would cause a person of reasonable prudence to investigate and discover that the delivery was not authorized, then he cannot hold the surety liable.⁶⁶ And if the surety applies to the creditor for informa-

⁶⁴ *State v. Pepper*, 31 Ind. 76; *Smith v. Peoria Co.*, 59 Ill. 412; *Johnson v. Weatherwax*, 9 Kan. 75; *State v. Potter*, 63 Mo. 212; *Savings Bank v. Boddicker*, 105 Iowa, 548.

⁶⁵ *State v. Peck*, 53 Me. 284; *Belden v. Hurlbut*, 94 Wis. 562; *Butler v. United States*, 21 Wall. 272; *Lewiston v. Gagne*, 89 Me. 395; *White v. Duggan*, 140 Mass. 18; *Thomas v. Bleakie*, 136 Mass. 568; *Russell v. Freer*, 56 N. Y. 67; *Dunn v. Garrett*, 93 Tenn. 650; *State v. Pepper*, 31 Ind. 76; *McCormick v. Bay City*, 23 Mich. 457; *State v. Potter*, 63 Mo. 212; *Look-out Bank v. Aull*, 93 Tenn. 645; *Cutler v. Roberts*, 7 Neb. 4; *Nash v. Fugate*, 32 Gratt. 595; *Sawyer v. Campbell*, 107 Iowa, 397; *Jordan v. Jordan*, 10 Lea, 124; *Ware v. Allen*, 128 U. S. 590; *Chicago v. Gage*, 95 Ill. 593; *State v. Supervisors*, 59 Ill. 412; *Clarke v. Williams*, 61 Minn. 12; *State v. Young*, 23 Minn. 89; *Stoner v. Keith County*, 48 Neb. 279; *Lewis v. Commissioners*, 70 Ga. 486; *Evans v. Daugherty*, 84 Ala. 68; *Doorley v. Lumber Co.*, 4 Kan. App. 93; *Savings Bank v. Boddicker*, 105 Iowa, 548, overruling *Daniels v. Gower*, 54 Iowa, 319. *Pepper v. State*, 22 Ind. 399, was overruled by *State v. Pepper*, 31 Ind. 76. *Ayres v. Milony*, 53 Mo. 516, was examined and questioned in *State v. Potter*, 63 Mo. 212. *People v. Bostwick*, 32 N. Y. 445, was questioned in *Russell v. Freer*, 56 N. Y. 67, and cited in *Whitford v. Laidler*, 94 N. Y. 145.

⁶⁶ *Savings Bank v. Boddicker*, 105 Iowa, 548; *United L. Ins. Co. v. Salmon*, 157 N. Y. 682.

tion respecting the principal which the creditor has and may properly give, but which he withholds without sufficient cause, or if he knowingly gives false information, he and not the surety must suffer the damage occasioned by the wrong.⁶⁷

So if the creditor promises to look alone to the principal for payment, and the surety, in reliance on that promise, surrenders securities held for his indemnity, or is induced to omit to procure security, or otherwise changes his position in reference to the principal, he then is no longer responsible for the performance of the obligation.⁶⁸ Whenever the obligee has notice that the surety signed upon condition which has not been fulfilled, then he is not an innocent holder, and the surety is not bound.⁶⁹

In order that failure to communicate a fact to the surety in respect to the subject matter of the proposed contract, shall have the effect of a fraud upon the surety and vitiate the contract, it must be a fact which necessarily increases the surety's liability or operates to the prejudice of his interest.⁷⁰ And so the mere failure of the obligee to disclose a fact to the surety, when he is under no obligation to speak, is not sufficient to release the surety.⁷¹

§ 52. IMPERFECT INSTRUMENT.—In some cases the principal fails to execute the instrument, and then the question arises, are the sureties liable? The courts do not agree, and their decisions are in conflict. In many jurisdictions the sureties are liable, though the name of the principal is not subscribed to the

⁶⁷ *Wolf v. Madden*, 82 Iowa, 114; *Powers Dry-Goods Co. v. Harlin*, 68 Minn. 193.

⁶⁸ *Harris v. Brooys*, 21 Pick. 195; *Bank v. Haskell*, 51 N. H. 116; *Whitaker v. Kirby*, 54 Ga. 277.

⁶⁹ *Middleboro Nat. Bank v. Richards*, 55 Neb. 682; *Comstock v. Gage*, 91 Ill. 328; *Deering Harv. Co. v. Peugh*, 17 Ind. App. 400; *Markland Mining Co. v. Kimme*, 87 Ind. 560.

⁷⁰ *Comstock v. Gage*, 91 Ill. 328; *Roper v. Sangamon Lodge*, 91 Ill. 518.

⁷¹ *Lake v. Thomas*, 84 Md. 608.

instrument.⁷² Other authorities hold that such bonds are of no validity, and that the sureties are not liable.⁷³

In those jurisdictions where the surety is held liable on such bonds, he may maintain an action against the officer for any sum he may be compelled to pay as such surety, notwithstanding such officer never signed and executed the bond.⁷⁴ Of course an instrument should be complete before the maker or surety delivers it. But if there is anything on the face of it, or any attending circumstances to apprise the obligee that the instrument has been delivered by the surety to his principal to be delivered to the obligee only upon certain conditions which have not been fulfilled, then the obligee is not an innocent holder, and the surety is not liable.⁷⁵ When the delivery is made directly to the obligee, it cannot be regarded as conditional in respect to the party who makes it, unless the condition is made known to the obligee. If the obligee knows of the condition attached to the delivery, then he will be presumed to assent from his acceptance of the instrument, and cannot then repudiate the condition.⁷⁶

Although there may be expectations that there is to be another surety from the statement of the principal when the bond was

⁷² *Trustees v. Sheik*, 119 Ill. 579; *Williams v. Marshall*, 42 Barb. 524; *Farker v. Bradley*, 2 Hill (N. Y.), 584; *Loew v. Stockney*, 68 Pa. St. 226; *Scott v. Whipples*, 5 Me. 336; *Johnson v. Weatherwax*, 9 Kan. 75; *State v. Pack*, 53 Me. 284; *Tillson v. State*, 29 Kan. 452; *State v. Peyton*, 32 Mo. App. 522; *Keyser v. Keen*, 17 Pa. St. 327; *State v. Bowman*, 10 Ohio, 445; *Herrick v. Johnson*, 11 Met. 26; *Haskins v. Lombard*, 16 Me. 140; *Grimm v. School Dist.*, 51 Pa. St. 219; *Miller v. Ferris*, 10 Upper Can. 423; *Bollman v. Posewalk*, 22 Neb. 761.

⁷³ *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass. 460; *People v. Hartley*, 21 Cal. 585; *Bunn v. Jetmore*, 70 Mo. 228; *Wills v. Dill*, 6 Martin (La.), 665; *Johnston v. Kimball*, 39 Mich. 187; *Hall v. Parker*, 39 Mich. 289; *Green v. Kindy*, 43 Mich. 279; *Board v. Sweeney*, 1 S. Dak. 642; *Sacramento v. Dunlap*, 14 Cal. 421; *Fletcher v. Austin*, 11 Vt. 447; *State v. Austin*, 35 Minn. 51; *Russell v. Annabel*, 109 Mass. 72; *Bean v. Parker*, 17 Mass. 403; *Gregory v. Cameron*, 7 Neb. 414.

⁷⁴ *Trustees v. Sheik*, 119 Ill. 579.

⁷⁵ *Cutler v. Roberts*, 7 Neb. 4; *Crystal Lake v. Hill*, 109 Mich. 246; *Savings Bank v. Boddicker*, 105 Iowa, 548; *Mullen v. Morris*, 43 Neb. 596.

⁷⁶ *Ward v. Churn*, 18 Gratt. 801.

signed by the surety, his bond is binding upon the one signing, although not signed by the other.⁷⁷ Thus, A executed a promissory note payable to the order of B, and induced C and D to sign as sureties, who signed and re-delivered it to A upon the promise that he would procure other persons named by them also to execute such note as sureties. In disregard of his promise A delivered the note to B without procuring the additional sureties agreed upon; the sureties C and D were bound.⁷⁸ But the rule is different where a surety signs the bond which is to be delivered only upon being signed by another whose name appears in the bond as a co-obligor. If delivered without being signed by the other whose name appears, without the consent of the one who has signed, the delivery is a nullity and the one signing is not bound.⁷⁹

If the instrument is incomplete on its face, and there has been a premature delivery, the obligee takes it with notice, because the obligee is presumed to have notice of its form and the reasonable import thereof.⁸⁰ The agreement must be written before delivery. Thus, a blank piece of paper signed and executed by the principal and sureties, which the principal afterwards fills out according to agreement, is not binding;⁸¹ but if it be a printed blank, such as a note, the surety can sign the blank and give the principal authority to fill up the note; and if wrongfully filled up the surety is bound.⁸²

§ 53. SURETY'S NAME NOT APPEARING IN THE BODY OF THE INSTRUMENT.—If parties sign a bond as sureties, but their names do not appear in the body of the bond, they are bound.⁸³ So it is not essential to charge a surety on a bond that his name

⁷⁷ *Simpson v. Bovard*, 74 Pa. St. 351.

⁷⁸ *Deardorff v. Foresman*, 24 Ind. 481.

⁷⁹ *Allen v. Marney*, 65 Ind. 398.

⁸⁰ *Hall v. Parker*, 37 Mich. 590; *Fales v. Filley*, 2 Mo. App. 345.

⁸¹ *Penn v. Howlett*, 27 Gratt. 337. Compare *Wiley v. Moor*, 17 Serg. & R. 292.

⁸² *Robeson v. Blevins*, 57 Kan. 50.

⁸³ *Neil v. Morgan*, 28 Ill. 524; *Potter v. State*, 23 Ind. 550; *Holmes v. State*, 17 Neb. 73.

must appear in the body of the bond if he otherwise executes it.⁸⁴ And so where there is a greater number of signatures than seals on a bond, two or more of the signers may adopt one seal and thereby become liable, although the names of all the obligors do not appear in the body of the instrument.⁸⁵

§ 54. **PRINCIPAL NOT SIGNING—NAME IN BODY OF THE INSTRUMENT.**—The decisions of the courts are not harmonious as to whether the sureties are liable where the principal's name appears in the body of the bond, but he does not sign it. One line of decisions hold that when the principal's name is in the body of the bond, though he does not sign it, the sureties who sign are liable.⁸⁶ So if the bond is not executed by the principal, if his name is mentioned in the body of the instrument, the surety is bound, though the obligor does not sign the bond.⁸⁷ But in some States, in such case the sureties are not liable unless the bond is signed by the principal.⁸⁸

§ 55. **ALTERATION OF THE INSTRUMENT.**—A material alteration of a bond or note after its execution, when intentionally made, by one having an interest in it, and without the consent of the party bound by it, invalidates the instrument as to such party. The alteration destroys the identity of the contract;

⁸⁴ *Leith v. Bush*, 61 Pa. St. 395; *Danker v. Atwood*, 119 Mass. 146; *Sheld v. Liebshultz*, 51 Ind. 38.

⁸⁵ *Building Association v. Cummings*, 45 Ohio St. 664.

⁸⁶ *Trustee v. Sheik*, 119 Ill. 579; *State v. Hill*, 47 Neb. 456; *Loew v. Stockney*, 68 Pa. St. 226; *Siertz v. Forquer*, 94 Cal. 91; *State v. Bowman*, 10 Ohio, 445.

⁸⁷ *Bollman v. Posewalk*, 22 Neb. 761; *State v. Peyton*, 32 Mo. App. 522; *Tillson v. State*, 29 Kan. 452; *Adams v. Kellogg*, 63 Mich. 616; *Parker v. Bradley*, 2 Hill (N. Y.), 584; *Johnson v. Johnson*, 31 Ohio St. 131; *Douglas County v. Bardo*, 79 Wis. 641; *Chase v. Hathorn*, 61 Me. 505; *Wildcat Branch v. Ball*, 45 Ind. 213.

⁸⁸ *Brown v. Jetmore*, 70 Mo. 228; *Gay v. Murphy*, 134 Mo. 98; *Ferry v. Burchard*, 21 Conn. 602; *Russell v. Annable*, 109 Mass. 72; *Bean v. Parker*, 17 Mass. 603; *Green v. Kindy*, 43 Mich. 279; *Goodyear Dental Vul. Co. v. Bacon*, 151 Mass. 460; *State v. Austin*, 35 Minn. 51. But in both classes of cases most of the decisions are supposed to rest upon construction of the local statute as to joint and several liability.

therefore, if a party to a contract who has not consented to the alteration were to be bound by it, it would be in effect imposing upon him, against his will, a new contract, as to whose terms he never agreed.⁸⁹ Thus, if A borrows of B \$1,000 upon his note indorsed by C, and afterwards, without the consent or knowledge of C, but with the knowledge and consent of B, the note was also by A raised to \$1,500, as security for the additional \$500, which thereupon B loaned to A, such alteration invalidated the note entirely as to C.⁹⁰ Such material alterations apply to contracts of suretyship.⁹¹

The general rule is that an alteration which does not destroy the identity of a written instrument, nor in any way affects the liability thereof of the surety, is not such an alteration as will release the surety.⁹²

§ 56. FILLING BLANKS—AS TO SURETY'S LIABILITY.—The surety may be held liable on a bond which he signs, the bond not being filled up. Thus, if the surety, relying upon the good faith of the principal, signs a bond in blank and returns it to the principal, the surety thereby clothes him with apparent authority to fill up the blanks at his discretion in any appropriate manner consistent with the nature of the obligation, so that the surety is bound as to an innocent obligee or payee.⁹³ Hence, parol authority is sufficient to fill up a sealed instrument, and this filling up is sufficient to hold the surety.⁹⁴ A party executing a bond, knowing that there are blanks in it to be filled up necessary to make it a perfect instrument, must be considered

⁸⁹ *Neff v. Homer*, 63 Pa. St. 330; *Chadwick v. Eastman*, 53 Me. 12; *Wood v. Steele*, 6 Wall. 80.

⁹⁰ *Batchelder v. White*, 80 Va. 103.

⁹¹ *Smith v. United States*, 2 Wall. 219; *Reese v. United States*, 9 Wall. 13; *Stoner v. Keith County*, 48 Neb. 279; *State v. Findley*, 101 Mo. 368.

⁹² *Bank v. Hyde*, 131 Mass. 77; *Bucklen v. Huff*, 53 Ind. 74; *Barber v. Burrows*, 51 Cal. 404; *Sawyer v. Campbell*, 107 Iowa, 397.

⁹³ *Chicago v. Gage*, 95 Ill. 593; *Smith v. Crooker*, 5 Mass. 538; *Green County v. Wilhite*, 29 Mo. App. 459; *Stahl v. Berger*, 10 Serg. & R. 170; *Ex parte Kerwin*, 8 Cow. 118.

⁹⁴ *Bartlett v. Board*, 59 Ill. 364; *Swartz v. Ballou*, 47 Iowa, 188; *State v. Young*, 23 Minn. 551.

as agreeing that the blanks may be thus filled after he has executed the bond.⁹⁵ In such cases the sureties are responsible for the additions that may be made to the instrument without knowledge of the obligee or payee.⁹⁶

§ 57. NEGOTIABLE NOTES.—The same rule applies to negotiable notes. Thus, where a party to such an instrument intrusts it to the custody of another for use with blanks not filled up, whether it be to accommodate the person to whom it was committed, or to be used for the benefit of the signer of the same, such instrument carries on its face the implied authority to fill up the blanks necessary to perfect the same. And as between such party and an innocent transferee, the former must be deemed the agent of the party who committed the note to his care in filling the blanks necessary to perfect the instrument.⁹⁷ Thus, sureties signed a note in blank and left it with the principal. The principal filled the blank with a larger sum than the sureties had agreed to become liable for, and delivered it to the creditor, who was an innocent holder for value; in such case the sureties are bound for the entire amount.⁹⁸ So if a surety makes it a condition that another shall sign, and the principal forges the name of the other surety, the first one will be held.⁹⁹ This is on the ground that where two innocent parties must be losers by the deceit or the fraud of another, the loss must fall on him who makes it possible to be thus defrauded.¹⁰⁰

§ 58. SURETY SIGNING AS PRINCIPAL.—It is a general rule that a party cannot contradict his own note or bond. So where

⁹⁵ *South Berwick v. Hunter*, 53 Me. 89; *State v. Pepper*, 31 Ind. 76; *McCormick v. Bay City*, 23 Mich. 457.

⁹⁶ *Rich v. Starbuck*, 51 Ind. 87; *Danker v. Atwood*, 119 Mass. 146; *Dedlich v. Doll*, 54 N. Y. 234; *Schuyver v. Hawkes*, 22 Ohio St. 308; *White v. Duggan*, 140 Mass. 18; *Donnell Manf. Co. v. Jones*, 49 Ill. App. 327.

⁹⁷ *Angle v. Insurance Co.*, 92 U. S. 330.

⁹⁸ *Fullerton v. Sturges*, 4 Ohio St. 529.

⁹⁹ *Stoner v. Milliken*, 85 Ill. 218; *York County Ins. Co. v. Brooks*, 51 Mo. 506; *Selser v. Brock*, 3 Ohio St. 302.

¹⁰⁰ *Stoner v. Milliken*, 85 Ill. 218; *Hun v. Nichols*, 1 Salk. 289; *Donnell Manf. Co. v. Jones*, 49 Ill. App. 327.

one expressly agrees to be bound as principal, and so signs, he is estopped from asserting against the obligee or payee that he is a surety.¹⁰¹ Because when one, who is in reality only a surety, signs expressly as principal, he must be held in that capacity.¹⁰²

§ 59. ESTOPPEL OF SURETY TO DENY RECITALS IN THE INSTRUMENT.—It is also the established rule that sureties are estopped to deny the facts recited in their obligations, whether true or false.¹⁰³ Thus, sureties on a bond for the delivery of goods to a party, provided the court should so order, the recitals in that instrument being that the sheriff had made seizure and levy on the goods, cannot deny the fact that the sheriff had made seizure and levy of the goods, because they are estopped to deny the sufficiency and validity of the seizure of the goods and levy of the attachment.¹⁰⁴

§ 60. DENYING VALID APPOINTMENT OF PRINCIPAL.—Sureties cannot deny the valid appointment of their principal to office in order to avoid liability. In other words, if sureties have signed the bond they are responsible. Where a bond is voluntarily entered into, the sureties are estopped by the recitals in the bond which admit the due appointment of their principal.¹⁰⁵ By executing the bond they obtain for their principal certain rights of action, and therefore cannot escape liability by denying their own bond.¹⁰⁶ And so the sureties are liable,

¹⁰¹ *Sprigg v. Bank*, 10 Pet. 257; 14 Pet. 201; *Dart v. Sherwood*, 7 Wis. 446; *Waterville Bank v. Redington*, 52 Me. 466; *Heath v. Bank*, 44 N. H. 174.

¹⁰² *McMillan v. Parkell*, 64 Mo. 286; *Picot v. Signiago*, 22 Mo. 587; *Derry Bank v. Baldwin*, 41 N. H. 434; *Clermont Bank v. Wood*, 10 Vt. 582. See sec. 210.

¹⁰³ *United States v. Bradley*, 10 Pet. 365; *Rogers v. United States*, 32 Fed. Rep. 890; *People v. Huson*, 78 Cal. 154; *Brockway v. Petted*, 79 Mich. 620; *Bruce v. United States*, 17 How. 437; *Harrison v. Wilkin*, 69 N. Y. 412; *Hanley v. Filbert*, 73 Mo. 34; *Olson v. Royem (Minn.)*, 77 N. W. Rep. 818; *Pearre v. Folb*, 123 N. Car. 239.

¹⁰⁴ *Hanley v. Filbert*, 73 Mo. 34.

¹⁰⁵ *Cutler v. Dickinson*, 8 Pick. 387.

¹⁰⁶ *Shroyer v. Richmond*, 16 Ohio St. 455; *Gray v. State*, 78 Ind. 68.

though their principal has been continued in the same capacity, after he has failed to perform his duty, of which the surety has not been advised.¹⁰⁷ And the general rule is that sureties cannot deny the appointment to office of their principal; that is, set up that such appointment was invalid.¹⁰⁸ And the fact that the bond is not prescribed by statute does not necessarily make it invalid, although given by a public officer as security for the discharge of his duties, if they are not unlawful; if voluntarily given, such bonds are binding upon all the parties.¹⁰⁹

§ 61. SURETIES CANNOT DENY THE INCORPORATION OF CORPORATE BODIES WITH WHOM THEIR PRINCIPAL DEALS.—Obligors in a bond are estopped to deny the corporate existence of bodies to whom it was given. Thus, the sureties on a treasurer's bond cannot deny the validity of the corporate organization of the corporation who is the obligee.¹¹⁰ And so where a person becomes surety upon a bond given to a corporation, he cannot deny its legal existence.¹¹¹

Neither can sureties deny the acts of the corporation, by declaring that the corporate authority has been extended beyond legitimate bounds.¹¹²

§ 62. DENYING COURT'S JURISDICTION.—When there is an action on a bond given in the ordinary course of legal business, the sureties will be estopped to deny the jurisdiction of the court

¹⁰⁷ Home Ins. Co. v. Holway, 55 Iowa, 571; Phoenix Ins. Co. v. Findley, 59 Iowa, 591.

¹⁰⁸ White v. Weatherbee, 126 Mass. 450; Williamson v. Woodman, 73 Me. 163; Burnet v. Henderson, 21 Tex. 588; Otto v. Jackson, 35 Ill. 349.

¹⁰⁹ United States v. Tingey, 5 Pet. 129; Taylor v. Hand, 7 How. 581; United States v. Bradley, 10 Pet. 361. Compare Thomas v. Burrus, 23 Miss. 550; Hudson v. Winslow, 35 N. J. L. 437.

¹¹⁰ Father Matthew Soc. v. Fitzwilliams, 84 Mo. 407.

¹¹¹ White v. Coventry, 29 Barb. 305; Trumbull Co. v. Horner, 17 Ohio, 407; Fort Wayne, etc., Co. v. Deane, 10 Ind. 563; Singer Manf. Co. v. Bennett, 28 W. Va. 16.

¹¹² People v. Burton, 5 Seld. 176; State v. Buffalo, 2 Hill (N. Y.), 434; Baehmer v. Schuylkill, 46 Pa. St. 452; McLean v. State, 8 Heisk. 22; Mississippi Co. v. Jackson, 51 Mo. 23; Wilson v. Monticello, 85 Ind. 10; Denison v. Gibson, 24 Mich. 187.

In many cases bonds are given, and when accepted by the court the principal and sureties are estopped to deny their validity.¹¹³ Thus, when the principal tenders a bond to the court, such as the law requires, justice requires that neither the principal nor the sureties shall be permitted to question the validity of the bond or that the court did not have jurisdiction of the subject-matter.¹¹⁴

§ 63. ATTACKING BOND IN COLLATERAL PROCEEDINGS.—Neither can the principal or sureties attack a bond in collateral proceedings upon the ground that it is void.¹¹⁵ And so sureties for purchase-money, with notice of defects in the title to the land purchased, are estopped from setting up the bad title in a suit for the purchase money.¹¹⁶ Under the same principle a surety on a bond for alimony cannot deny that the woman receiving the alimony was the wife of his principal.¹¹⁷

§ 64. RELATIONS AFTER JUDGMENT.—After the debt has been reduced to judgment, the relation of principal and surety has not been changed. The merger of the contract into judgment does not change their relations. Its only effect is a change in form of the credit as between the principal and surety.¹¹⁸ The judgment does not abrogate the relation of suretyship between the parties.¹¹⁹

§ 65. EFFECT OF JUDGMENT ON SURETY.—Sureties are bound by the judgment against their principal to the same extent that

¹¹³ *Waddell v. Bradway*, 84 Ind. 537; *Harbough v. Albertson*, 102 Ind. 69.

¹¹⁴ *Carver v. Carver*, 77 Ind. 498.

¹¹⁵ *Nevitt v. Woodburn*, 160 Ill. 203; *Monteith v. Commonwealth*, 15 Gratt. 172, 185; *Stoval v. Banks*, 10 Wall. 583.

¹¹⁶ *Ellis v. Adderton*, 88 N. Car. 472.

¹¹⁷ *Commissioners v. O'Rourke*, 34 Hun, 349.

¹¹⁸ *Bangs v. Strong*, 4 N. Y. 415; *Moss v. Pettingill*, 3 Minn. 217; *Smith v. Rice*, 27 Mo. 505; *Commonwealth v. Miller*, 8 Serg. & R. 452; *Davis v. Maynard*, 9 Mass. 242; *Blazer v. Bundy*, 15 Ohio St. 57.

¹¹⁹ *Chambers v. Cochran*, 18 Iowa, 159; *Carpenter v. Denon*, 5 Ala. 710; *Cowen v. Culbert*, 3 Ga. 239; *Morton v. Rice*, 19 Mo. 263.

their principal is.¹²⁰ If the effect of the obligation is such that the surety is to be bound by the results of the litigation between others he is, in the absence of fraud or collusion, bound by such results. Where the bond is not merely to pay damages, but is an indemnity against liability by judgment, it is conclusive.¹²¹ But in some States it is held the liability of the surety depends upon the character of the bond. If it undertakes to pay such judgment as may be recovered, that judgment is conclusive, because that judgment is the event on the happening of which the surety agrees to pay;¹²² but a judgment against the principal does not bind the surety as a general rule, because it is only *prima facie* evidence of liability to its extent.¹²³

¹²⁰ *Stovall v. Banks*, 10 Wall. 583; *Shepard v. Pebles*, 38 Wis. 373; *Meyer v. Barth*, 97 Wis. 352; *Richardson v. Bank*, 57 Ohio St. 299; *State v. Slaughter*, 80 Ind. 597; *Heard v. Lodge*, 20 Pick. 53; *Irwin v. Backus*, 25 Cal. 214; *Smith v. Smithson*, 48 Ark. 261; *Martin v. Tally*, 72 Ala. 23; *Housh v. People*, 66 Ill. 178; *Nevitt v. Woodburn*, 160 Ill. 203; *Moulding v. Wilhartz*, 169 Ill. 422; *Holden v. Curry*, 85 Wis. 504; *McKim v. Haley*, 173 Mass. 112.

¹²¹ *Conner v. Reeves*, 103 N. Y. 527; *Riddle v. Baker*, 13 Cal. 295.

¹²² *Crawford v. Turk*, 24 Gratt. 176; *State v. Nutter*, 44 W. Va. 385.

¹²³ *State v. Nutter*, 44 W. Va. 385; *Craddock v. Turner*, 6 Leigh, 116; *Jacobs v. Hill*, 2 Leigh, 393.

CHAPTER IV.

SCOPE OF SURETY'S LIABILITY.

§ 66. **EXTENT OF SURETY'S CONTRACT.**—It is well established that the obligation of a surety is not to be extended beyond what the terms of the contract fairly import. So a surety has a right to stand upon the very terms of his contract, and if he does not assent to any variance of it, and a variation is made, such variation operates to annul his contract.¹ Thus, when a surety stands bound for the fidelity or capacity of a principal in an official capacity, if the nature of the employment is so changed by the act of the employer that the risk of the surety is materially altered from what was contemplated by the parties at the time of entering into the bond, the surety has a right to say that his obligation does not extend to such altered state of things; this is the general rule recognized by all courts.²

So the surety cannot be held beyond the precise terms of his contract. This is the well settled rule, both at law and in equity.³ And the scope of his liability is to be gathered from the whole instrument in which the obligation is contained.⁴

¹ *Australian Joint Stock Bank v. Bailey* (1899), App. Cas. 396; *Lee v. Dick*, 10 Pet. 482; *Crist v. Burlingham*, 62 Barb. 351; *Hoey v. Jarman*, 39 N. J. L. 523; *Locke v. McVean*, 33 Mich. 473.

² *Miller v. Stewart*, 9 Wheat. 680; *Pybus v. Gibb*, 6 El. & B. 902; *Manufacturers' Nat. Bank v. Dickerman*, 41 N. J. L. 448; *Mumford v. Railroad Co.*, 2 Lea, 393; *First Nat. Bank v. Gerke*, 68 Md. 449.

³ *McKicken v. Webb*, 6 How. 292; *Bowmaker v. Moore*, 7 Price, 223; *Smith v. United States*, 2 Wall. 219; *McCluskey v. Cromwell*, 11 N. Y. 593; *McDonald v. Harris*, 75 Ill. App. 111; *Lafayette v. James*, 92 Ind. 240; *Ryan v. Williams*, 29 Kan. 487; *Hopewell v. McGrew*, 50 Neb. 789; *Howard Co. v. Hill*, 88 Md. 111; *Ryan v. Morton*, 65 Tex. 258; *Tomlinson v. Simpson*, 33 Minn. 443; *Lee v. Hastings*, 13 Neb. 508; *Burson v. Andes*, 83 Va. 445; *Whilen v. Boyd*, 114 Pa. St. 228; *Webster Co. v. Hutchinson*, 60 Iowa, 721; *Manufacturers' Bank v. Cole*, 39 Me. 188; *Shine v. Bank*, 70 Mo. 524; *People v. Toomey*, 122 Ill. 308; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338; *Streeper v. Sewing Mach. Co.*, 112 U. S. 676; *McCartney v. Ridgway*, 160 Ill. 129.

⁴ *Australian Joint Stock Bank v. Bailey* (1899), App. Cas. 396.

§ 67. CONSTRUCTION OF CONTRACT—AT LAW.—The terms used and the language employed in guaranties, letters of credit, and other obligations of sureties, must have a reasonable interpretation, according to the intent of the parties, as disclosed by the instrument, read in the light of surrounding circumstances and purpose for which it was made.⁵ And the surety is liable to the same extent as the principal, and such liability need not be fixed by a judgment of court.⁶ And where the surety states the amount for which he will be liable, that fixes the extent of his liability.⁷ The liability of a surety must be ascertained by reference, not to the recital alone, but to the bond in its entirety.⁸

It is unquestionably the well settled rule of law that a surety is entitled to a somewhat rigid construction of his contract; but before this rule is applied, his contract is subject to the same construction as any other contract, in order to ascertain and give effect to the intent of the parties, and it is not until this is ascertained that its language is to be regarded as *strictissimi juris*.⁹ When the meaning of the language has been thus ascertained, the responsibility of the surety is not to be extended or enlarged by implication or construction, but is *strictissimi juris*.¹⁰

The surety is bound by the contract which he makes, and not by some contract which he did not make, even though the latter may be more favorable to him than the former.¹¹ Thus, where the debt is paid in installments, if any of the installments is paid

⁵ First Nat. Bank v. Gerke, 68 Md. 449; Lewis v. Dwight, 10 Conn. 95; Mason v. Pritchard, 12 East, 227; McDonald v. Harris, 75 Ill. App. 111; DeCamp v. Bullard, 33 App. Div. 627.

⁶ Kroncke v. Madsen (Neb.), 77 N. W. Rep. 202.

⁷ Bullowa v. Orgo (N. J. Ch.), 41 At. Rep. 494.

⁸ Wilson v. Webber, 92 Hun, 466; 157 N. Y. 693.

⁹ Belloni v. Freeborn, 63 N. Y. 383; People v. Backus, 117 N. Y. 196; Gamble v. Cuneo, 21 App. Div. 413; Locke v. McVean, 33 Mich. 473; Shreffler v. Nadelhoffer, 133 Ill. 536.

¹⁰ People v. Backus, 117 N. Y. 196.

¹¹ Jackson v. Patrick, 10 S. Car. 197; General Steam Nav. Co. v. Roltz, 6 C. B., N. S. 550; Calvert v. Dock Co., 2 Keen, 638; Greenville v. Ormand, 51 S. Car. 121.

in advance, it is held, the surety is released.¹² And new terms cannot be added to the contract by reading the instrument in connection with a statute.¹³ He has the right to stand on the very terms of the contract.¹⁴ And where the condition of the bond or contract is plainly set forth it cannot be controlled by any recital not plainly inconsistent therewith.¹⁵

§ 68. CONSTRUCTION OF CONTRACT—IN EQUITY.—Courts of equity, as well as courts of law, interpret contracts of sureties with considerable strictness in favor of the sureties.¹⁶ But if the liability cannot be enforced against the surety at law by reason of any fraud, accident or mistake, equity will enforce the contract according to the obvious intention of the parties.¹⁷

So where the contract does not express the intention of the parties, to the injury of the obligee, and that is clearly made to appear, equity will reform the instrument as well against surety as principal.¹⁸

§ 69. LIABILITY FOR PAST DEFAULTS OF PRINCIPAL.—Sureties are not responsible for prior defaults of their principal, unless they so contract.¹⁹ But the guaranty or suretyship may cover a note given for a pre-existing debt. Thus, where a

¹² *General Steam Nav. Co. v. Roltz*, 6 C. B., N. S. 550; *Greenville v. Ormand*, 51 S. Car. 121; *Welch v. Hubschmitt Co.*, 61 N. J. L. 57.

¹³ *Howard Co. v. Hill*, 88 Md. 111.

¹⁴ *Warden v. Ryan*, 37 Mo. App. 466; *Judah v. Zimmerman*, 22 Ind. 388; *Johnson v. May*, 76 Ind. 293; *Mayhew v. Boyd*, 5 Md. 102; *Ryan v. Trustees*, 14 Ill. 20.

¹⁵ *Australian Joint Stock Bank v. Bailey* (1899), App. Cas. 396.

¹⁶ *Miller v. Stewart*, 9 Wheat. 680.

¹⁷ *Brooks v. Brooks*, 12 Gill & J. (Md.) 306; *Berg v. Radcliff*, 6 Johns. Ch. 302.

¹⁸ *Olmsted v. Olmsted*, 38 Conn. 309; *United States v. Cushman*, 2 Sumner, 434.

¹⁹ *Abrams v. Pomeroy*, 13 Ill. 133; *State v. Jones*, 89 Mo. 470; *Rochester v. Randall*, 105 Mass. 295; *Detroit v. Weber*, 29 Mich. 24; *Van Sickle v. Buffalo Co.*, 13 Neb. 103; *Kellum v. Clark*, 97 N. Y. 390; *Crown v. Commonwealth*, 84 Va. 282; *Stern v. People*, 96 Ill. 475; *Rogers v. State*, 99 Ind. 218; *Webster Co. v. Hutchinson*, 60 Iowa, 721; *Pine Co. v. Willard*, 39 Minn. 125; *American Dist. Tel. Co. v. Lennig*, 139 Pa. St. 594; *Newcomer v. State*, 77 Tex. 286.

contract of guaranty provides for the payment of all notes discounted by a bank "from the date" thereof, a note discounted by the bank after such date is covered by the guaranty, although it is given to cancel a note given to the bank before the contract was made.²⁰ And so sureties are liable for money paid their principal, though he misapplies it to pay prior delinquencies covered by another bond with other sureties.²¹

And a contract of suretyship may act retrospectively where the parties so agree, because then it is the contract of the surety.²²

§ 70. LIABILITY LIMITED TO A FIXED TIME.—A surety is not to be held beyond the precise term of his contract. So where the principal is in office for a definite period, the surety is only liable for his faithful performance of his duties during that period. If the bond is silent as to the length of the term, but the statute under which the bond is given fixes the term, the statute in that regard will be regarded as the period of the contract with the surety. In such case the sureties do not contract for their principal's discharge of obligations which he might assume or duties which might be imposed upon him after he leaves office.²³

The general rule as touching the extent of the obligation of the surety on official bonds is, that the obligation by intendment will be confined to the official term about the commencement or current at the time such bond comes into existence, and when the office is annual the parties to the bond are presumed, by law, to bind themselves accordingly, if there are no words in the bond clearly extending it to a future term.²⁴

²⁰ *Peoria Savings, etc., Co. v. Elder*, 165 Ill. 55.

²¹ *Gwynne v. Burnell*, 7 Cl. & F. 572; *Inhabitants v. Bell*, 9 Met. 490; *Pine Co. v. Willard*, 39 Minn. 125.

²² *Abrams v. Pomeroy*, 13 Ill. 133.

²³ *Ulster Co. Sav. Bank v. Ostrander* (N. Y.), 57 N. E. Rep. 627; *Bryan v. United States*, 1 Black, 140; *United States v. Nicholl*, 12 Wheat. 505; *People v. Toomey*, 122 Ill. 308; *Lord Arlington v. Merricke*, 3 Saund. 403; *People v. Pennock*, 60 N. Y. 421.

²⁴ *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Mayor v. Crowell*, 40 N. J. L.

But when the bond provides that the officer is to be chosen annually and holds his office until another is chosen and qualified in his stead, the sureties are bound only for the year for which he was chosen, and for such further time as is reasonably sufficient for the election and qualification of his successor, but not longer.²⁵ When a bond is conditioned for the faithful performance of the principal's duties "during his continuance in office," without specifying the length of time, the surety is liable for one year only, the term of the principal being limited to that time.²⁶ And in general a surety cannot be held on an official bond for a longer period than that limited by his undertaking.²⁷

§ 71. TIME LIMITED TO A SUBSEQUENT PERIOD.—To enlarge the responsibility of sureties in a bond or in any other contract, there must be words in the condition extending the time beyond the fixed term of office. It is not enough that the recitals should be "so long as he continue in office," or "until a successor is appointed." If the office is annual or limited the surety will not be prejudiced by a failure to bind according to the requirements of the law or rule which regulates such appointment. His intention to assume a further and continued liability must be found in the words of the bond. It is not a matter of inference, but of exposition.²⁸ Thus, a surety's liability is extended by the following language: "During the time he shall continue in the said office, whether of the present term for which he has been duly elected, or of any succeeding term to or for which he may be elected."²⁹

207; *Dover v. Twombly*, 42 N. H. 59; *Welch v. Seymour*, 28 Conn. 387; *May v. Horn*, 2 Harr. (Del.) 190.

²⁵ *Chelmsford Co. v. Demarest*, 7 Gray,

²⁶ *Kitou v. Julian*, 4 El. & B. 854.

²⁷ *Mullikin v. State*, 7 Blackf. 77; *Urmston v. State*, 73 Ind. 175; *Riddel v. School Dist.*, 15 Kan. 168; *Savings Bank v. Hunt*, 72 Mo. 597; *Noridge-wock v. Hale*, 80 Me. 362; *Scott Co. v. Ring*, 29 Minn. 398; *Kellum v. Clark*, 97 N. Y. 390; *Barry v. Association*, 67 Tex. 250; *Roper v. Sangamon Lodge*, 91 Ill. 518; *Myers v. Farmer*, 52 Iowa, 20; *Black v. Oblender*, 135 Pa. St. 526.

²⁸ *Angero v. Keen*, 1 Mees. & W. 390; *Oswald v. Berwick*, 1 El. & B. 295; 3 El. & B. 653; 5 H. L. Cas. 856.

²⁹ *People's Build. Asso. v. Wroth*, 43 N. J. L. 70.

If the bond is drawn so as to cover subsequent periods, the sureties are bound.⁸⁰

§ 72. EMPLOYMENT OR CONDITION CHANGED BY EMPLOYER OR BY THE LEGISLATURE.—If by act of the parties or by act of the legislature, the nature of the office is so changed that the duties are materially altered so as to affect the liability of the sureties, their responsibility is ended. If the nature and the functions of the office or employment are changed, then it is not the same office within the meaning of the bond.⁸¹ Hence, if the nature of the employment is so changed by the act of the employer that the risk of the surety is materially altered, the surety's liability ceases.⁸² So the increase of the principal's salary on re-employment relieves the surety for all subsequent defaults.⁸³ And so, where a bank increases its capital stock and it is paid in, then the surety on the bond of the cashier is no longer liable for subsequent defaults of his principal.⁸⁴ Likewise the sureties on a cashier's bond of an unincorporated bank are released from liability if the company becomes incorporated.⁸⁵

It has been held that extending the charter of a bank by the legislature ends the surety's liability on the bond of the cashier, though his duties are identical with those before extension,⁸⁶ but such doctrine is doubtful,⁸⁷ and cannot be applied where the

⁸⁰ Board v. Pabst, 70 Wis. 352; Lang v. Seay, 72 Mo. 648; Fox v. McCord, 54 Iowa, 346; Daley v. Commonwealth, 75 Pa. St. 331; Dedham Bank v. Chickering, 3 Pick. 335; Jacobs v. Hill, 2 Leigh, 393; Mayor v. Wright, 16 Q. B. 63.

⁸¹ Pybus v. Gibb, 6 El. & Bl. 902; Manufacturers' Bank v. Dickerson, 41 N. J. L. 448; Mumford v. Railroad Co., 2 Lea, 393.

⁸² Miller v. Stewart, 9 Wheat. 680; First Nat. Bank v. Gerke, 68 Md. 449.

⁸³ Bamford v. Iles, 3 Exch. 380.

⁸⁴ Grocers' Bank v. Kingman, 16 Gray, 473. Compare Morris Canal Co. v. Van Vorst, 21 N. J. L. 100; Bank v. Wollaston, 3 Harr. (Del.) 90; Lionberger v. Kieger, 88 Mo. 160.

⁸⁵ Besinger v. Wren, 100 Pa. St. 500.

⁸⁶ Thompson v. Young, 2 Ohio. 334; Union Bank v. Ridgely, 1 H. & G. 324; Bank v. Barrington, 2 Pa. 27; Brown v. Lattimore, 17 Cal. 93.

⁸⁷ Exeter Bank v. Rogers, 7 N. H. 21.

statute provided for such extension or other change when the surety signed.³⁸

If the nature of the principal's duty is unchanged, and new or different duty is imposed upon him by the alteration in the regulation of his employer, the surety is still liable. Thus, a railroad company may raise a station to one of first-class, and this will not release the surety on the station agent's bond, where the agent has the identical duties as before the change of the station's re-classification.³⁹

§ 73. SURETIES IN LEGAL PROCEEDINGS—ORDER OF LIABILITY.—As between different sets of sureties who undertake to secure the same debt, although in different stages of legal proceedings, the primary liability rests upon the latter set.⁴⁰ Thus, a surety in an injunction bond enjoining a judgment against the acceptor of a bill of exchange, has no right to call upon the indorsers of the bill for indemnity for such payment; they are not his principals or co-sureties, nor has he any right to be substituted to the right which the payee once had against indorsers for payment of the bill.⁴¹

Bail are sureties and entitled to the benefit of the general principle applicable to the relation which they bear toward their principal and his creditor as well as toward other sets of sureties.⁴² In other words, bail have the same rights as other sureties consistent with their duties.

74. ONLY LIABLE FOR PENALTY OF THE BOND.—The general principle is that in suits on penal bonds with collateral limitations, the surety is liable only for the penalty.⁴³

³⁸ *People v. Backus*, 117 N. Y. 196; *National Bank v. Phelps*, 97 N. Y. 44.

³⁹ *Strawbridge v. Railroad Co.*, 14 Md. 360.

⁴⁰ *Hinckley v. Kreitz*, 58 N. Y. 583; *Culliford v. Walser*, 158 N. Y. 65; *Parsons v. Briddock*, 2 Vern. 608; *Burns v. Bank*, 1 Pa. 395; *Pott v. Nathan*, 1 W. & S. 155; *McCormick v. Irwin*, 35 Pa. St. 111; *Brandenburg v. Flynn*, 12 B. Mon. 397.

⁴¹ *Bohannon v. Combs*, 12 B. Mon. 563.

⁴² *Culliford v. Walser*, 158 N. Y. 65. See sec. 213 *et seq.*

⁴³ *Farrar v. United States*, 5 Pet. 373; *Showlles v. Freeman*, 81 Mo. 540; *Greater v. DeWolf*, 112 Ind. 1; *Fraser v. Little*, 13 Mich. 195; *Farlie v.*

The undertaking of the surety is essentially a pledge to make good the misfeasance or non-feasance of his principal to the amount co-extensive with the penalty of the bond.⁴⁴ But the surety is liable for the legal interest which has accrued from the time of his liability, besides the penalty.⁴⁵

§ 75. MISAPPROPRIATION OF FUNDS.—Where the principal is bound for the faithful performance of his duties, the contract will fix the measure of the surety's liability; and he will not be liable for defaults of his principal to perform any duty or obligation arising out of a contract or otherwise not fairly within the provision of the written contract or bond so given to secure. Thus, sureties are not liable on a bond for any moneys advanced to their principal to enable him to prosecute his business for the obligee, when such obligation was not set out in the bond, though they are liable for moneys received by the principal in his line of duty.⁴⁶ So where a bond is given by an overseer of the poor, in which the principal was to account for all sums of money which came to his hands by virtue of his office, the sureties are not liable for moneys which he borrows without authority and applies to other purposes not within the scope of his business.⁴⁷

Sureties are not liable for funds of their principal which he misappropriates, unless such moneys are designated by their contract of suretyship.⁴⁸

§ 76. INCREASE OF FUNDS.—Where the fund is increased within the legal purview of the contract, the surety is liable for

Lawson, 5 Cow. 424; *Clark v. Bush*, 3 Cow. 151; *Wood v. Tish*, 63 N. Y. 245; *Delo v. Banks*, 101 Pa. St. 458; *Stull v. Lee*, 70 Iowa, 31.

⁴⁴ *Leggett v. Humphrey*, 21 How. 66.

⁴⁵ *Holmes v. Standard Oil Co.*, 183 Ill. 70; *James v. State*, 65 Ark. 415; *Wyman v. Robinson*, 73 Me. 384; *Whereatt v. Ellis*, 103 Wis. 348.

⁴⁶ *Burlington Ins. Co. v. Johnson*, 120 Ill. 622.

⁴⁷ *Leigh v. Taylor*, 7 B. & C. 491.

⁴⁸ *Humboldt, etc., Society v. Wennerhold*, 81 Cal. 528; *Commonwealth v. Toms*, 45 Pa. St. 408; *Nolley v. County Court*, 11 Mo. 447; *Smith v. Stephen*, 53 Ga. 300; *Sutherland v. Carr*, 85 N. Y. 105; *Urmston v. State*, 73 Ind. 175; *Atterstein v. Alpaugh*, 9 Neb. 237; *Linch v. Litchfield*, 16 Ill. App. 612.

his principal's misappropriation of such increase. Thus, where the principal receives interest on the fund in the hands of his depositary, his surety is liable for default in paying over that interest to the obligee.⁴⁹ And so where the State by appropriate legislation increases the funds in the hands of the principal, the surety's liability is not thereby released;⁵⁰ and interest will be charged from the date of conversion, for which the sureties will be liable.⁵¹ And so the surety will be liable for liquidated damages.⁵² And indefinite suretyship extends to all the accessories of the principal's obligation, such as costs and the like.⁵³ Unless the surety limits his liability in the contract, such accessories are within the meaning of the contract of principal and surety.

§ 77. SURETY MAY LIMIT HIS LIABILITY.—Where the surety states the amount for which he will be liable, properly incorporated in the contract, that amount fixes the extent of his liability.⁵⁴ So if the sum is increased beyond the amount as set forth in the contract for which the surety binds himself to pay, the excess cannot be collected from the surety,⁵⁵ for the surety cannot be bound beyond the scope of his engagement;⁵⁶ he is bound to the extent of his agreement, and only by reason of such agreement.⁵⁷

§ 78. FORGED SIGNATURES.—Forgery does not always release the liability of a surety. Thus, when the name of one or more obligors in a bond or note or other writing obligatory

⁴⁹ *Hunt v. State*, 124 Ind. 306; *Comstock v. Gage*, 91 Ill. 328.

⁵⁰ *People v. Backus*, 117 N. Y. 196.

⁵¹ *Curtis v. United States*, 100 U. S. 119; *Cassady v. Trustees*, 105 Ill. 560.

⁵² *Griale v. Capen*, 72 Ill. 11.

⁵³ *Lafayette, etc., Asso. v. Kleinhoff*, 40 Mo. App. 388; *Woolley v. Van Valkenburgh*, 16 Kan. 20.

⁵⁴ *Bullowa v. Orgo*, 57 N. J. Eq. 428.

⁵⁵ *Finney v. Condon*, 86 Ill. 78; *Farmers', etc. Bank v. Evans*, 4 Barb. 487; *Bragg v. Shaw*, 49 Cal. 131; *Kimball v. Baker*, 62 Wis. 526.

⁵⁶ *Parker v. Wise*, 6 Maule & S. 239.

⁵⁷ *Ludloy v. Simond*, 2 Caine's Cas. 29; *Smith v. Lockwood*, 34 Wis. 77; *Houck v. Graham*, 123 Ind. 277; *Doud v. Walker*, 48 Iowa, 634; *Stetson v. Bank*, 12 Ohio St. 577; *Gay v. Hultz*, 56 Mich. 153; *Bank v. Smith*, 12 Allen, 243; *Ellesmere Brewing Co. v. Cooper* (1896), 1 Q. B. 75.

has been forged, the surety, though he signed in the belief that the forged name was genuine, is nevertheless bound if the payee or obligee accepted the instrument without notice and for value.⁵⁸ The surety's liability is not changed, though two names or more of the principals are forged, the fact being unknown to the surety and holder when delivered.⁵⁹ And where one surety, a married woman, is released on account of coverture, this does not discharge the other surety.⁶⁰

§ 79. ADDITIONAL EMPLOYMENT.—If the office held by the principal is altered by addition of new duties, the surety is no longer liable; but when the principal is appointed to a new office, the surety is still liable for defaults connected with the old office.⁶¹ Where the omissions of the principal to perform his duties is wholly disconnected from improper acts on his part in the new business, and is not superinduced by his new appointment, the surety is still liable.⁶² But the liability of the surety cannot be extended to embrace other undertakings not specifically covered by his bond.⁶³ So where the liability of the surety is limited to the transactions and defaults of a principal, he cannot be made liable for defalcations and omissions of another principal, who joins the first in the business;⁶⁴ because where a surety agrees to answer for the defaults of a principal, he does not thereby agree to answer for the defaults of a firm of which his principal may become a partner.⁶⁵

⁵⁸ *Veazie v. Willis*, 6 Gray, 90; *Stoner v. Milliken*, 85 Ill. 218; *Wheeler v. Bank (Ky.)*, 55 S. W. Rep. 552; *Helms v. Society*, 73 Ind. 325; *Lombard v. Mayberry*, 24 Neb. 674. Compare *Southern Cotton Oil Co. v. Bass (Ala.)*, 28 South. Rep. 576.

⁵⁹ *Chase v. Hathorn*, 61 Me. 505.

⁶⁰ *Warren v. Tobacco Exchange (Ky.)*, 55 S. W. Rep. 912.

⁶¹ *Skillett v. Fletcher*, L. R. 2 C. P. 469.

⁶² *Home Savings Bank v. Traube*, 75 Mo. 199.

⁶³ *Kellogg v. Scott (N. J.)*, 44 At. Rep. 190; *Noyes v. Granger*, 51 Iowa, 227.

⁶⁴ *White Sewing Mach. Co. v. Hines*, 61 Mich. 423.

⁶⁵ *Billairs v. Ebsworth*, 3 Camp. 52; *Dry v. Davy*, 10 Ad. & El. 30; *Palmer v. Bagg*, 56 N. Y. 523; *Parham Sewing Mach. Co. v. Brock*, 113 Mass. 194; *Dobbins v. Bradley*, 15 Wend 422.

So as a general rule, in the absence of legislation, or by express agreement, there is no liability on the part of a contractor to respond to parties employed by a sub-contractor,⁶⁶ and so the sureties of the contractor are not liable to such employees.⁶⁷

§ 80. ACT OF PRINCIPAL NOT IN LINE OF HIS BUSINESS.—A surety will not, in general, be relieved from responsibility because the act of the principal which occasioned the loss was not strictly in the line of his duties of his office, or was done in the course of temporary or casual performance of other duties at the request of his employer.⁶⁸ Nor will the imposition of additional, distinct and consistent duties upon the principal, or his appointment to an additional office, his original office being retained, necessarily relieve the surety from his obligation, if the new duties or the new office have no such connection with the old as to interfere with or affect the original employment.⁶⁹ But if the principal is promoted and such promotion involves a material alteration of the principal's duties, this will increase the peril of the surety and relieve him from his bond.⁷⁰ And in general, the liability of a surety on an official bond cannot without his consent be extended or enlarged by the obligee or by operation of law.⁷¹

§ 81. BECOMING SURETY FOR PAYMENT OF RENT.—A party, as in other contracts of suretyship and guaranty, may become a surety to the payment of rent. And where rent is payable in installments and the landlord releases the tenant as to payment of installments due or past due, it will not relieve the surety of the tenant from liability as to subsequent installments;⁷² because

⁶⁶ *Wells v. Williams*, 39 Barb. 567.

⁶⁷ *Faurote v. State*, 110 Ind. 463.

⁶⁸ *German Bank v. Auth*, 87 Pa. St. 419; *Detroit Bank v. Zeigler*, 49 Mich. 157; *Rochester Bank v. Elwood*, 21 N. Y. 88.

⁶⁹ *American Tel. Co. v. Lennig*, 139 Pa. St. 595; *Mayor v. Kelly*, 98 N. Y. 468.

⁷⁰ *Manufacturers' Bank v. Dickerson*, 41 N. J. L. 448.

⁷¹ *Besinger v. Wren*, 100 Pa. St. 500; *Miller v. Stevens*, 9 Wheat. 680; *Smith v. United States*, 2 Wall. 219; *Singer Machine Co. v. Hebbs*, 21 Mo. App. 574.

⁷² *Kingsbury v. Williams*, 53 Barb. 142; *Ducker v. Rapp*, 67 N. Y. 464; *Coe v. Cassidy*, 72 N. Y. 133.

each installment is a separate and independent demand, and so the extension of the time of payment, or release of payment, will not impair the obligation of the surety as to the others.⁷³

§ 82. TENANT HOLDING OVER.—The surety may become liable, if the contract so expresses the intention of the parties, for rent where the tenant holds over.⁷⁴ But if the lease does not provide that the surety shall be liable for a second term or for rent in case the tenant holds over, the surety is liable only for the term stated in the lease, for it cannot be implied that the surety agreed to such extension.⁷⁵

If the lease is defective, but the tenant enters upon the premises, then the surety is liable.⁷⁶ And a guarantor of the payment of rent is not discharged from liability for rent past due, by a surrender of the lease, and of rent thereafter to accrue, without his knowledge or consent. Nor is he released by the destruction of the building by fire as to rent thereafter accruing.⁷⁷ And when the rent is specifically guaranteed to the landlord, he cannot transfer a legal title to the guaranty to his assignee of the lease,⁷⁸ because a special guaranty cannot be assigned, as it is limited to the person to whom it is addressed, and usually contemplates a trust or reposes a confidence in such person. Such a guaranty may not be assigned until the right of action has accrued.⁷⁹ But one who purchases a note which is guaranteed generally, is entitled to the benefit of such general guaranty,⁸⁰ though he buys in ignorance of such guaranty.⁸¹

§ 83. PRINCIPAL ASSOCIATING WITH OTHERS.—A surety for a principal cannot be made liable for default if other parties

⁷³ *Ducker v. Rapp*, 67 N. Y. 464.

⁷⁴ *Dufau v. Wright*, 25 Wend. 636; *Deblois v. Earle*, 7 R. I. 26; *Rice v. Loomis*, 139 Mass. 302.

⁷⁵ *Brewer v. Thorp*, 36 Ala. 9.

⁷⁶ *Clark v. Gordon*, 121 Mass. 330.

⁷⁷ *Kingsbury v. Westgate*, 61 N. Y. 336.

⁷⁸ *Potter v. Groubeck*, 117 Ill. 404.

⁷⁹ *Jex v. Straus*, 122 N. Y. 293.

⁸⁰ *Ellsworth v. Harmon*, 101 Ill. 274; *Claffin v. Ostror*, 54 N. Y. 581.

⁸¹ *Tidioute Savings Bank v. Libbey*, 101 Wis. 193.

become associated with his principal in business. Thus, where the principal enters a partnership the surety is not liable for the partnership defaults, because it is a material change as to his liability. And conversely, where the principal takes another person into his business, his surety is no longer liable. Taking a partner is a violation of the contract with the surety; he engages as surety for the conduct of one man, and to bring two or more principals into the business would be a violation of his contract.⁸² So a guaranty of the payment of goods supplied to two parties is made invalid when one partner goes out of business with the consent of his copartner and the vendor.⁸³

§ 84. SEVERAL PRINCIPALS—PARTNERSHIP.—If a party engages as surety to several individuals, his obligation does not extend beyond the death or retirement of any of them for whom he has engaged to be answerable. This rule applies as well to parties to whom the surety is bound, the obligee, as to those for whom he is bound, the obligors.⁸⁴

In the nature of things there cannot be a partnership consisting of several persons, in which there are not some possessed of greater business capacity than the others, and it may be that a partner dying or going out of the firm may be the very one on whom the surety himself relies; it would be, therefore, very unreasonable to hold the surety to the contract after such change.⁸⁵ The only exceptions to this rule are: (1) Where the nature of the obligation expressly limits the liability or extends it to the survivors, whether associated together or otherwise. (2) Where the parties for or to whom the sureties are

⁸² *Mathews v. Garman*, 110 Mich. 559; *London Assurance Corporation v. Bold*, 6 A. & E. 523; *Bellaire v. Ebsworth*, 3 Camp. 55; *Parham Sew. Mach. Co. v. Brock*, 113 Mass. 197; *Connecticut M. L. Ins. Co. v. Scott*, 81 Ky. 540; *White Sewing Mach. Co. v. Hines*, 61 Mich. 423; *Montefiore v. Lloyd*, 15 C. B., N. S. 203.

⁸³ *Bill v. Barker*, 16 Gray, 62.

⁸⁴ *University of Cambridge v. Baldwin*, 5 Mees. & W. 585; *Simpson v. Cook*, 1 Bing. 452; *Myers v. Edge*, 7 T. R. 254; *Strange v. Lee*, 3 East, 484; *Weston v. Barton*, 4 Taunt. 673; *Penoyer v. Watson*, 11 Johns. 100; *Smith v. Montgomery*, 3 Tex. 203; *Blair v. Ins. Co.*, 10 Mo. 559; *State v. Boon*, 44 Mo. 254.

⁸⁵ *Weston v. Barton*, 4 Taunt. 673.

bound, are described as a class, company, bank, or the like, and not to the members or partners *nominatim*, so as plainly to imply that the security is given to or for the class or body as such, regardless of changes in the integral parties.⁸⁶

§ 85. DEATH OF SURETY.—The death of the surety does not ordinarily terminate his contract when it is a continuing one. In such case if defaults occur after his death his estate is liable for the default of the principal. Thus, where a bond is given binding the surety, "his heirs, executors and administrators," the liability of the surety is not terminated by his death, but extends to his estate.⁸⁷ So a continuing suretyship is not terminated by the death of the surety as to moneys and property of the obligee, in the line of the business, that may come into the hands of his principal after his death; upon default of the principal the obligee has recourse to his estate.⁸⁸ So the liability of a surety on an official bond during the continuance of the principal's term of office, extends as well to definite defaults committed after as before the death of the surety.⁸⁹ Whenever the undertaking of the surety is for a definite period, as for the officer's conduct during his term of office, or for the repayment of advances made to the principal in the bond, until notice is given the obligee that the liability is terminated, the estate of the surety in the hands of his administrator or executor is answerable for any defaults of the principal occurring after his death; this is especially so where the surety binds his "heirs, executors and administrators" for the performance of his undertaking.⁹⁰

§ 86. CONSTRUING A JOINT OBLIGATION AS SEVERAL.—A court will not vary the legal effect of the instrument by making

⁸⁶ *Barclay v. Lucas*, 1 Term R. 201; *Gorgan v. School Dist.*, 4 Colo. 53.

⁸⁷ *Royal Life Ins. Co. v. Davis*, 40 Iowa, 499; *Gordon v. Calvert*, 4 Russ. 581.

⁸⁸ *Rapp v. Ins. Co.*, 113 Ill. 390.

⁸⁹ *Green v. Young*, 8 Me. 14.

⁹⁰ *Moore v. Wallis*, 18 Ala. 458; *Hightown v. Moore*, 46 Ala. 327; *Mowbray v. State*, 88 Ind. 327.

it several as well as joint unless it can see either by independent testimony or from the nature of the transaction itself, that the parties concerned intended to create a separate as well as a joint liability. If from fraud, ignorance or mistake, the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This has been done where there is a previous equity which gives the obligee the right to several indemnity from each of the obligors, as in the case of money lent to both of them. In such case a court of equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is the parties intended their contract to be joint and several, but through fraud, ignorance, mistake or want of skill, they failed to accomplish their object.⁹¹ This presumption is never made in the case of a mere surety, whose duty is measured alone by the legal force of the bond, who is under no moral obligation whatever to pay the obligee independent of his covenant, and consequently there is nothing on which to found an equity for the interposition of a court of chancery. If the surety should die before his principal his representatives cannot be sued at all on the joint obligation; nor will they be charged in equity.⁹²

It is the rule that, in case of joint obligation of sureties, if one of the joint obligors die, his representatives are discharged and the survivors alone can be sued; but where the joint obligors are two principal debtors who received some benefit from the joint obligation, courts of equity have taken jurisdiction in case of the death of one of the obligors and enforced the obligation against his representatives. Because in conscience the estate of

⁹¹ *Richardson v. Draper*, 87 N. Y. 337; *Powell v. Kettelle*, 1 Gil. (Ill.) 49; *Baskin v. Andrews*, 53 Hun, 95.

⁹² *United States v. Price*, 9 How. 90; 1 Wall. Jr., 173; *Waters v. Riley*, 2 Harris & G. 311; *Bradley v. Burwell*, 3 Denio, 65; *Weaver v. Shyrook*, 6 Serg. & R. 262; *Pickersgill v. Lahens*, 15 Wall. 140. In some States the obligation of the surety survives his death, and his estate is bound, controlled by statute. *Redmon v. Marvel*, 73 Ind. 593; *Miss. Code*, 2353.

the deceased obligor ought to respond to the obligation.⁹³ But the mere joint obligation of a deceased principal is not sufficient to create an equity against his estate. His estate cannot be pursued in equity unless there is some moral obligation antecedent to the bond. But such obligation cannot exist where the deceased is a mere surety.⁹⁴

§ 87. REVOKING SURETYSHIP.—It has already been shown when death of surety revokes his liability. The general rule is a surety or guarantor cannot relieve himself of future liability by serving notice on the obligee in the absence of a stipulation in the contract to that effect. Thus, where a surety becomes liable for the rent of premises for a time certain, the mere notice by him that he will not be liable further has no effect upon his contract; he cannot dissolve his contract at pleasure.⁹⁵ If a surety desires to terminate his liability by notice, he must so specify in his contract.⁹⁶

In the case of a simple guaranty for a proposed loan, the right of revocation exists before the proposal has been acted upon. The promise to guarantee for a time definite creates no additional liability on the guarantor, but, on the contrary, fixes the limit in time beyond which his liability cannot extend. So such a guaranty to secure money to be advanced to a third party on discount to a certain amount for such time is revocable within that time.⁹⁷

A mere offer to guarantee is only binding so far as it is acted upon, and the guarantor may revoke the offer before its acceptance. Where the guaranty is not a continuing one, the guarantor may terminate his responsibility at any time by giving notice to the other party that he will be holden no longer. Thus, an accommodation note, made payable at a bank on demand, may be pledged by the principal as a continuing guaranty for future

⁹³ *Boakin v. Andrews*, 87 N. Y. 337.

⁹⁴ *United States v. Price*, 9 How. 90; *Pickersgill v. Lahens*, 15 Wall. 140.

⁹⁵ *Coe v. Vogdes*, 71 Pa. St. 383.

⁹⁶ *Calvert v. Gordan*, 3 Man. & Ry. 124.

⁹⁷ *Offord v. Davies*, 12 C. B., N. S. 748.

loans, to be made to him by the bank; but the surety may terminate his responsibility by notice.⁹⁸ A guaranty may be revoked at any time when the promise creates no obligation, but is in the nature of a proposal.⁹⁹ And when a surety has a right by his contract to terminate his liability by giving notice, after notice he is no longer liable for subsequent acts of his principal.¹⁰⁰

And where the period of the surety's liability is not fixed, he can terminate his liability by giving notice to the obligee that he will be no longer bound.¹⁰¹ In giving this notice, it should be clear and explicit and not ambiguous.¹⁰² In continuing contracts guarantying the fidelity of a person, or employee, the revocation may be made upon proper notice, but the right must be exercised reasonably, giving the employer a reasonable time to adjust the changed circumstances. Thus, the employer cannot be compelled to discharge the employee instantaneously, but he may take a reasonable time to do it.¹⁰³

§ 88. DEFAULT OF PRINCIPAL.—Where the person employed commits an act of dishonesty or defaults and is unfaithful to his trust, which is known to his employer, the employer is, in duty bound for his own protection, to take precaution for his own safety which the surety may require to be taken for his, in order that future defaults may be avoided.¹⁰⁴ Knowledge of the dishonesty of the employee by the employer, which renders him unfit for the place, without disclosure of the fact to the guarantor or surety, terminates the contract, and confines the liability to acts already done.¹⁰⁵ But this conduct of which

⁹⁸ *Agawam Bank v. Strever*, 18 N. Y. 502.

⁹⁹ *Offord v. Davies*, 12 C. B., N. S. 748; *Jordan v. Dobbins*, 122 Mass. 168; *Hyler v. Habich*, 150 Mass. 112.

¹⁰⁰ *Pleasant's Appeal*, 75 Pa. St. 383.

¹⁰¹ *Jendevine v. Rose*, 36 Mich. 54; *Pratt v. Trustees*, 93 Ill. 475.

¹⁰² *Lenusse v. Barker*, 3 Wheat. 101.

¹⁰³ *LaRose v. Bank*, 102 Ind. 332; *Bostwick v. Van Voorhis*, 91 N. Y. 353.

¹⁰⁴ *Dwelling House Ins. Co. v. Johnston*, 90 Mich. 170.

¹⁰⁵ *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Burgess v. Eve*, L. R. 13 Eq. 450; *Graves v. Bank*, 10 Bush, 23; *LaRose v. Bank*, 102 Ind. 332; *Hunt v. Roberts*, 45 N. Y. 691; *Sanderson v. Oston*, L. R. 8 Exch. 73; *Emery v. Baltz*, 94 N. Y. 408.

the employer has knowledge, and which will release the guarantor or surety from further liability, must relate to the service in which the principal, or employee, is engaged, and must be something more than mere delinquency, having no relation to or connection with the subject-matter of the guaranty or suretyship.¹⁰⁶

§ 89. REVIVAL OF SURETY'S LIABILITY.—At common law an oral acknowledgment is sufficient to revive a barred debt.¹⁰⁷ In some States the promise must be express, or an additional promise with a performance of a condition, or a qualified admission that the debt is due and unpaid. The promise must be of such character as to clearly show a recognition of the debt and an intention to pay it.¹⁰⁸

The duty resting upon a surety to see that his principal performs the contract guaranteed, subsists as a moral obligation after the statute of limitation has run against the right to enforce it, and will support a new promise by the surety to answer for the principal's default.¹⁰⁹ Such new promise requires no new consideration to support it.¹¹⁰ So where a surety is relieved of liability on a note, and subsequently he makes a part payment of the note and promises to pay the balance with knowledge that his liability had been extinguished, it will bind him, as it revives his liability.¹¹¹ Some decisions, however, hold that a new consideration as well as a new promise is necessary to take the case out of the operation of the statute of limitation.¹¹² But this matter is regulated, in many States, by statutory provisions.

Under the common law, where a surety has been released by the extension of the time of payment, his liability will be

¹⁰⁶ *Atlas Bank v. Brownell*, 9 R. I. 168; *Andrews v. Bealls*, 9 Cow. 693; *LaRose v. Bank*, 102 Ind. 332.

¹⁰⁷ *Perkins v. Cheney*, 114 Mich. 567.

¹⁰⁸ *Carroll v. Forsyth*, 69 Ill. 127.

¹⁰⁹ *Perkins v. Cheney*, 114 Mich. 567.

¹¹⁰ *Tebbetts v. Dowd*, 23 Wend. 379; *Parsons v. Dickinson*, 23 Mich. 56.

¹¹¹ *Hinds v. Ingham*, 31 Ill. 400.

¹¹² *Van Derveer v. Wright*, 6 Barb. 547.

revived by a new promise to pay, or by his absolute and unqualified acknowledgment of the existence of the debt, which implies a promise to pay.¹¹³

§ 90. PART PAYMENT BY ONE OF SEVERAL AND JOINT DEBTORS.—The American doctrine is that a part payment by one of several joint debtors is inoperative to prevent the running of the statute of limitations as to the others.¹¹⁴ In order to prevent the running of the statute, payment must be made by the debtor in person, or for him by authority, or for him and in his name without authority, but subsequently ratified by him. The mere fact that he has knowledge of payment being made by his co-debtor is not sufficient.¹¹⁵ Hence, a partial payment of a promissory note or debt by the principal debtor will not suspend the statute of limitations as to the surety.¹¹⁶ Because the partial payment voluntarily made by a debtor upon a claim or debt is in the nature of an acknowledgment or admission by him of his liability for the whole demand, and from the fact that he made the payment, a new promise on his part to pay the remainder of the debt may be implied, and under this legal inference such new promise arises at the time the partial payment is made, but this does not renew the debt as to his co-debtors.¹¹⁷ Thus, partial payment made by one debtor on a note, will not sus-

¹¹³ *Smith v. Winter*, 4 Mees. & W. 454; *Stevens v. Lynch*, 12 East, 38; *Fowler v. Brooks*, 13 N. H. 240; *Bramble v. Ward*, 40 Ohio St. 267; *Banning v. Hall*, 70 Minn. 94.

¹¹⁴ *Waughop v. Bartlett*, 165 Ill. 124; *Willoughby v. Irish*, 35 Minn. 63.

¹¹⁵ *McMullen v. Rafferty*, 89 N. Y. 456; *Littlefield v. Littlefield*, 91 N. Y. 203.

¹¹⁶ *Mozingo v. Ross*, 150 Ind. 688.

¹¹⁷ *Van Keuren v. Parmelee*, 2 N. Y. 523; *Shoemaker v. Benedict*, 11 N. Y. 176; *Winchell v. Hicks*, 18 N. Y. 558; *McLaren v. McMartin*, 36 N. Y. 88; *Harper v. Fairley*, 53 N. Y. 442; *Graham v. Selover*, 59 Barb. 313; *Succession of Voorheis*, 21 La. Ann. 659; *Smith v. Coon*, 22 La. Ann. 445; *Hunter v. Robertson*, 30 Ga. 479; *Bell v. Morrison*, 1 Pet. 351; *Morienthal v. Mosler*, 16 Ohio St. 566; *Vance v. Hair*, 25 Ohio St. 349; *Steele v. Souder*, 20 Kan. 39; *Davis v. Clark*, 58 Kan. 454; *Pfenninger v. Kokesch*, 68 Minn. 81; *Willoughby v. Irish*, 35 Minn. 63.

pend the running of the statute in favor of the other debtors thereon, although the party paying be the principal debtor and the others only sureties.¹¹⁸

But other courts, following the English rule, hold that part payment by one of the several and joint makers, before the statute attaches, takes it out of the operation of the statute as to the other debtors, or makers. The principle on which payment by a joint debtor is allowed to affect the other parties, is the community of interest among them, which creates the presumption that the party paying would not acknowledge that which is adverse to his own interest, and therefore it will be in the interest of the others and bind them.¹¹⁹

§ 91. ABSENCE OF PRINCIPAL FROM THE STATE.—Under the general American rule, the absence of the principal from the State will not suspend the running of the statute in favor of the surety.¹²⁰ Because the principal's and the surety's liability are several; and where there is a several liability, each debtor is entitled to the protection of the statute, and can be deprived of it only by some personal act of his own. The sureties are severally liable, and are severally entitled to the protection of the statute of limitation.¹²¹

§ 92. DISABILITY OF PRINCIPAL.—As a general rule, whenever the principal is discharged, his surety will be relieved of liability also. To this rule, however, there are exceptions. Thus, in some States, a note by a married woman is void. But her surety, in the absence of fraud, is liable on the note, not-

¹¹⁸ *Steele v. Souder*, 20 Kan. 39; *Mozingo v. Ross*, 150 Ind. 688; *Waughop v. Bartlett*, 165 Ill. 124.

¹¹⁹ *Block v. Dorman*, 51 Mo. 31; *Disbrough v. Bideman*, 20 N. J. L. 275; *Corliss v. Fleming*, 30 N. J. L. 349; *Whitlock v. Doolittle*, 18 Vt. 440; *Pike v. Warren*, 15 Me. 390; *Hunt v. Bridgham*, 2 Pick. 581; *Caldwell v. Sigourney*, 19 Conn. 37; *Perkins v. Barstow*, 6 R. I. 505.

¹²⁰ *Bottles v. Miller*, 112 Ind. 584; *Mozingo v. Ross*, 150 Ind. 688.

¹²¹ *Davis v. Clark*, 58 Kan. 454.

withstanding her discharge.¹²² If the payee is ignorant of the insanity of the principal on a note, such insanity will discharge the principal, but not the surety.¹²³

Nor is the surety's liability tested by determining whether he can recover indemnity from his principal. When the contract is valid in its inception, the principal debtor may be discharged by operation of law without discharging the surety, where the creditor does not by his acts contribute to the release. Thus, a discharge of the principal in bankruptcy does not discharge the surety.¹²⁴ And where a married woman's note is void, she may buy real estate and give her note signed by sureties for the purchase price, and the sureties only will be held, though the title to the real estate passes to the woman.¹²⁵

So a surety signing a partnership note is bound, though the note was executed by one of the partners without authority.¹²⁶ Where a note is procured by duress in violation of law, and contrary to public policy, morality and justice, then the surety is not liable further than the principal, and whatever discharges the principal frees the surety from liability.¹²⁷

§ 93. CONFLICT OF LAWS.—Suretyship, like other contracts, is governed by the law of the place where made. Thus, a note made and payable in a State, signed by a surety, will be governed by the law of that State; and so the law of that State relating to sureties applies in a suit in another State.¹²⁸ And so if the note would be invalid if made in the State where

¹²² *Davis v. Stotts*, 43 Ind. 103; *Allen v. Berryhill*, 27 Iowa, 531; *Kimball v. Newell*, 7 Hill (N. Y.), 116; *Whitworth v. Carter*, 43 Miss. 61; *Jones v. Crothwaite*, 17 Iowa, 393; *Lobaugh v. Thompson*, 74 Mo. 600; *Wagoner v. Watts*, 44 N. J. L. 126.

¹²³ *Lee v. Yandell*, 69 Tex. 34.

¹²⁴ *Guild v. Butler*, 122 Mass. 498; *Lackey v. Steere*, 121 Ill. 598; *Ellis v. Wilmot*, 10 Exch. 10.

¹²⁵ *Foxworth v. Bullock*, 44 Miss. 457. See, also, *Wiggins' Appeal*, 100 Pa. St. 155; *Winn v. Sanford*, 145 Mass. 302; *Yales v. Wheelock*, 109 Mass. 502; *Patterson v. Cone*, 61 Mo. 439.

¹²⁶ *Stewart v. Baehm*, 2 Watts, 356.

¹²⁷ *Osborn v. Robbins*, 36 N. Y. 365.

¹²⁸ *Howard v. Fletcher*, 59 N. H. 151.

enforced, yet if valid in the State where made the court will apply the law of the State where executed.¹²⁹

But where a contract is made relating to the title of real estate, that is different. The general principle of the common law is that the law of the place where real estate is situated exclusively governs, in respect to the right of the parties, the transfer and solemnities which must accompany them. Hence, a promissory note made by a wife as surety for her husband, in a State where she resides, although void there by the law of that State, can be enforced against her separate estate in land in another State where she would have a right so to contract, when she contracted with reference to such separate estate and intended to charge it with her debt.¹³⁰

¹²⁹ *Milliken v. Pratt*, 125 Mass. 374; *Long v. Templeman*, 24 La. Ann. 564.

¹³⁰ *Frierson v. Williams*, 57 Miss. 451.

CHAPTER V.

DISCHARGE OF SURETY.

§ 94. PAYMENT OF DEBT DISCHARGES THE SURETY.—Payment of the debt by the principal discharges the surety.¹ Whenever the principal debtor is released the surety or co-sureties are also discharged, and it is immaterial by whom the debt is paid.² Thus, if the creditor receives money from the principal as payment, the surety is discharged, although the money was that of a third party who had made the principal his agent to buy the note and not to pay it.³ When the liability of the principal in a note is discharged by payment, the liability of the surety is also extinguished;⁴ and the liability of the surety cannot exceed that of his principal,⁵ except a discharge of the principal in a bond by operation of law does not discharge the surety.⁶

§ 95. WHAT ACTS OF PRINCIPAL WILL DISCHARGE THE SURETY AFTER JUDGMENT.—Whatever acts will discharge a surety before judgment, while the obligation is only one of contract, will have the same effect after judgment. Such rule is to prevent wrong and injury and protects the surety under his just right to look to his principal for indemnity when he is damnified by his undertaking; and it prevents the creditor from discharging the principal and imposing the entire burden upon the surety without means of redress.⁷ However, there are cases

¹ *Chapman v. Collins*, 12 Cush. 163; *Coots v. Farnsworth*, 61 Mich. 497.

² *Crawford v. Beall*, 21 Md. 208.

³ *Eastman v. Plumer*, 32 N. H. 238.

⁴ *Petefish v. Watkins*, 124 Ill. 384.

⁵ *United States v. Allsburg*, 4 Wall. 186.

⁶ *Whereatt v. Ellis*, 103 Wis. 348; *Phillips v. Solomon*, 42 Ga. 192.

⁷ *Commonwealth v. Miller*, 8 Serg. & R. 452; *Talmadge v. Burlingham*, 9 Pa. St. 21; *Carpenter v. King*, 9 Met. 511; *Bangs v. Strong*, 10 Paige, 11; 7 Hill, 520; *Trotter v. Strong*, 63 Ill. 272; *New York Bank Note Co. v. Kerr*, 77 Ill. App. 53; *Boughton v. Bank*, 2 Barb. Ch. 458; *Potts v. Nothaus*, 1 Watts & S. 155; *Keighler v. Savage Manf. Co.*, 12 Md. 383; *Gustine v. Bank*, 10 Rob. (La.) 412; *Ames v. Maclay*, 14 Iowa, 281.

to the contrary, though against the weight of authority, which hold that after the contract has been reduced to judgment, the equity of the surety terminates with regard to the creditor, and the prior obligation is merged in the new one created by law, and the surety becomes a principal and is bound for the debt irrespective of what his principal and creditor may do. These cases go upon the ground that such equities cannot be shown, neither when the contract is under seal nor when it has been reduced to judgment.⁸

96. LEGALITY OF PAYMENT.—A payment may be illegal; if illegal, and the creditor is compelled to pay over the money received to those who are legally entitled to it, then the surety will not be discharged. The act of the creditor which discharges the surety must be an act involving something inequitable at the time it is done, and which interferes with the right of the surety. So where the creditor has received money in payment which belongs to other parties, and which they can and do legally claim, that is no payment, and the surety is not discharged if the money is reclaimed.⁹

However, if a third party wishes to buy the note and makes the principal his agent, he will be bound by his agent's acts. Thus, if a third party gives money to the principal to buy the note for him, but the principal pays the note, and the creditor receives it in good faith, it is a payment, and the surety is discharged.¹⁰ But if the money had been raised by the debtor by aid of the indorsement of the surety, given for the express purpose of enabling the debtor to raise funds to pay the secured debt, and this fact is communicated to the creditor, then he must apply it as the surety directed. But if the creditor is not informed of the intention of the surety, then he can make his own application.¹¹

⁸ *Lafarge v. Dillenbach*, 3 Denio, 157; *Lenox v. Prout*, 3 Wheat. 520; *Findley v. Bank*, 2 McLean, 44; *Bay v. Tallmadge*, 5 Johns. Ch. 305; *Pole v. Ford*, 2 Chit. 125.

⁹ *Petty v. Cooke*, L. R. 6 Q. B. 789.

¹⁰ *Eastman v. Plumer*, 32 N. H. 238.

¹¹ *Harding v. Tift*, 75 N. Y. 461.

§ 97. APPLICATION OF PAYMENTS.—The rule in regard to the application of payments is this: (1) The debtor at the time of payment has a right to designate the claim to which it shall apply. (2) If the debtor fails to make the application when he has the opportunity of so doing, the creditor may apply the payment to any of several legal claims at his option. (3) If neither debtor or creditor makes the application the law itself will apply the payment as justice and equity require.¹² As to a surety, this doctrine applies when the principal makes the payment from funds which are his own free from any equity in favor of the surety. Thus, where the specific money paid to the creditor and applied to a debt of the principal for which the surety is not bound, is the very money for the collection and payment of which he is surety, he is not bound by such application, and can have it applied to the debt for which he is surety.¹³ Whenever justice and equity show that the surety has rights in the application of the money, it must be applied at his command.¹⁴ Thus, a surety on a contract to secure a bank against loss on future overdrafts by the principal debtor, has an interest in such principal's account, and is entitled to have payment applied upon the account guaranteed.¹⁵ The civil law will apply payments to the unsecured debts, in preference to secured debts, except when the latter are secured by a surety, in which case the application will be made to the surety's relief.¹⁶ At common law the application must be made in the interest of the creditor to the most precarious debt.¹⁷

In some jurisdictions the rule is that the application must be made to the most precarious security whenever the interest of the creditor requires it, but not to the prejudice of the surety,

¹² *Koch v. Roth*, 150 Ill. 212.

¹³ *Merchants' Ins. Co. v. Herber*, 68 Maine, 420.

¹⁴ *Hansen v. Rounsaville*, 74 Ill. 238.

¹⁵ *Drake v. Sherman*, 179 Ill. 362. See, also, *Crossly v. Stanley (Iowa)*, 83 N. W. Rep. 806.

¹⁶ *Blackmore v. Granbury*, 98 Tenn. 277; *Brendenbecker v. Lowell*, 32 Barb. 23; *Marryatt v. White*, 2 Starkie, 101; *Pattison v. Hall*, 3 Cow. 747.

¹⁷ *Field v. Holland*, 6 Cr. 8; *Mathews v. Switzler*, 46 Mo. 301; *Stanford Bank v. Benedict*, 15 Conn. 437; *Morrison v. Bank*, 65 N. H. 253.

who may insist on an appropriation to the oldest debt, and hold himself bound or discharged accordingly.¹⁸

§ 98. APPLICATION BY LAW.—In the absence of any direction by the debtor, and the creditor has made no application of payment, then the law steps in and makes the application. The law will apply the payment to the oldest item of indebtedness in the absence of any circumstance which will render such application unjust to third parties.¹⁹ And so where a payment has been properly applied upon a particular note, it instantly extinguishes to the extent of that payment; and the note being made by several, it cannot be revived against any of the parties without the consent of all. An attempt thus to revive an extinguished liability would be fraud upon the surety.²⁰

§ 99. NOTE PAYABLE TO A BANK—APPLICATION OF DEBTOR'S DEPOSIT.—The fact that the principal debtor in a note payable to a bank, has funds on deposit in the bank after the maturity of the note, and before suit on the note, exceeding the sum due thereon, and the bank does not appropriate the same to its payment, does not discharge the surety.²¹ It is at the election of the bank alone to apply such funds to the payment of the note, and the surety cannot complain if the deposit is not so applied.²²

Of course, when the principal creditor has means of satisfaction actually or potentially within his control, he must retain

¹⁸ *Pardee v. Markle*, 11 Pa. St. 555; *Berghaus v. Alter*, 9 Watts, 386. See, also, *Grasser v. Rogers*, 112 Mich. 112.

¹⁹ *Toulmin v. Copland*, 2 Cl. & F. 681; *Mills v. Fowkes*, 5 Bing.N. C. 455; *Frost v. Mixsell*, 33 N. J. Eq. 586.

²⁰ *Miller v. Montgomery*, 31 Ill. 350.

²¹ *Citizens' Bank v. Elliott* (Kans. App.), 59 Pac. Rep. 1102; *Voss v. Bank*, 83 Ill. 599; *National Machine Bank v. Peck*, 127 Mass. 298; *Houston v. Braden* (Tex. Civ. App.), 37 S. W. Rep. 467.

²² *Clayton's Case*, 1 Merv. 572; *Strong v. Foster*, 17 C. B. 207; *Newburgh Bank v. Smith*, 66 N. Y. 271; *Pemberton v. Oakes*, 4 Russ. 154; *Martin v. Bank*, 6 Har. & Johns. (Md.) 235. Compare *McDowell v. Bank*, 1 Harr. (Del.) 369; *Dawson v. Bank*, 5 Pike, 283, 298; *Law v. East India Co.*, 4 Ves. 824.

them for the benefit of the surety; but this rule does not apply to deposits in a bank. Because without an express agreement or direction, it is optional with the bank whether or not it will apply the money thus on deposit in payment of the note.²³

It is held in Indiana that a bank has no right without the depositor's consent to apply money due him as depositor to the payment of a note held by it upon which it is liable as surety;²⁴ but this rule does not apply in Pennsylvania, and the bank can apply it to the payment of such note.²⁵

§ 100. CHANGE IN THE PRINCIPAL CONTRACT.—It is the general rule that any agreement between the principal and the obligee or payee essentially varying the terms of the contract, by which the surety is bound, without the latter's consent, will release him from responsibility.²⁶ Thus, a surety for a partnership which is to continue for a specified period, is discharged if the partnership is continued for a longer time than that prescribed in the contract.²⁷ So where a person becomes surety for the payment of a certain sum as alimony, a subsequent increase of the amount to be paid by the husband releases the surety.²⁸

And so where a person becomes a surety on a contract whereby the principal agrees to sell goods on commission for the vendor, which were to be shipped as ordered, and to remit cash received on sales in accordance with the terms of the contract, and subsequently the contract is extended so as to cover a larger quantity

²³ *Newburgh Bank v. Smith*, 66 N. Y. 271; *People's Bank v. Legrand*, 103 Pa. St. 309.

²⁴ *Lamb v. Morris*, 118 Ind. 179.

²⁵ *Lancaster First Nat. Bank v. Shreiner*, 110 Pa. St. 188.

²⁶ *McCartney v. Ridgway*, 160 Ill. 129; *Gardiner v. Harback*, 21 Ill. 128; *Stillman v. Wickham*, 106 Iowa, 597; *First National Bank v. Goodman*, 55 Neb. 418; *McWilliams v. Mason*, 31 N. Y. 294; *Warden v. Ryan*, 37 Mo. App. 466; *Wier Plow Co. v. Walmsley*, 110 Ind. 242; *Simonson v. Grant*, 36 Minn. 439; *Sage v. Strong*, 40 Wis. 575; *Whilen v. Boyd*, 114 Pa. St. 225; *Hamblen v. Knight*, 60 Tex. 36; *Jones v. Boyd*, 40 Ohio St. 139; *Batchelder v. White*, 80 Va. 103; *Smith v. Sheldon*, 35 Mich. 42.

²⁷ *Small v. Currie*, 5 DeG. M. & G. 141.

²⁸ *Sage v. Strong*, 40 Wis. 575.

of goods which the principal had previously purchased from the vendor—he is released from his liability as surety.²⁹

In general, if the principal does any act or makes any agreement for a valuable consideration without the consent of the surety, express or implied, and which tends to his injury, or which suspends the right to coerce payments to the prejudice of the surety, or which shall put the surety in a worse condition or increase his risk or impair the ultimate liability over of the principal to him, the surety will be discharged;³⁰ because he cannot be made liable for any default in the performance of a contract which he had not guaranteed.³¹

§ 101. WHEN THE SURETY IS NOT DISCHARGED BY CHANGE OF CONTRACT.—Some changes or qualifications of the original contract have no detrimental effect upon the surety's rights, and he is not discharged. Thus, a surety is not discharged by a contract between his principal and their common obligee which does not place the surety in a different position from that which he occupied before the contract was made.³² And so a surety cannot complain of the reduction of the rent reserved in a lease for the payment of which he is liable, though made without his knowledge; it will not release him from his obligation any more than if the amount of such reduction had been indorsed as a payment upon the lease. Therefore, a reduction from seventy-five dollars a month rent to fifty dollars will not release the surety.³³ Likewise, sureties upon a bond with the condition that the principal shall pay for all purchases made by him from the obligee, are not discharged from liability by the obligee's taking the note of the principal for purchases made by him.³⁴

§ 102. ALTERATION OF THE INSTRUMENT.—Upon the question of the alteration of the instrument, there is a conflict of

²⁹ *Wier Plow Co. v. Walmsley*, 110 Ind. 242.

³⁰ *Boynton v. Phelps*, 52 Ill. 210.

³¹ *Taylor v. Bank*, 11 App. Cas. 596.

³² *Roach v. Summer*, 20 Wall. 165; *Stuts v. Strayer*, 60 Ohio St. 284.

³³ *Preston v. Huntington*, 67 Mich. 139.

³⁴ *Parham Sewing Mach. Co. v. Brock*, 113 Mass. 194.

authority, and two distinct lines of decisions: (1) The earlier ruling of the courts seems to hold that any alteration of a contract, however immaterial, after its execution in the absence of the other party, avoided it.³⁵ (a) Because the alteration must affect the question of the identity of the instrument. (b) Because such an unauthorized act of a party having the custody of a deed should be construed most strongly against himself, and if legalized might facilitate injury and irremediable fraud.³⁶ (2) The other line of cases holds that a mere alteration of an instrument, without affecting the legality of the contract or any of the parties thereto, does not render it invalid; that the question must be settled upon the ground of justice and common sense, and not upon technical quibbling, by which it has been held that sureties have been discharged.³⁷

So under the old rule any change in the contract made without the surety's consent discharged him, though such change is for his benefit.³⁸ So it is not sufficient to uphold the contract after its alteration, however slight, and even if the change inures to the surety's benefit.³⁹ This is the common law rule. But the weight of authority is that any alteration which does not destroy the identity of the written contract, nor in any manner affect the liability of the surety, is not such an alteration as will release the surety.⁴⁰

§ 103. MATERIAL ALTERATION OF INSTRUMENT.—It is now the rule in both England and in the United States that a material

³⁵ *Pigot's Case*, 11 Coke, 27.

³⁶ *Johnson v. Bank*, 2 B. Mon. 311.

³⁷ *Bank v. Hyde*, 131 Mass. 77; *Smith v. United States*, 2 Wall. 219; *Wehr v. German Congregation*, 47 Md. 177; *Kaufmann v. Rowan*, 189 Pa. St. 121.

³⁸ *Dey v. Martin*, 78 Va. 1; *Christian v. Keen*, 80 Va. 369.

³⁹ *Miller v. Stewart*, 9 Wheat. 681; *Reese v. United States*, 9 Wall. 13; *Stephens v. Graham*, 7 Serg. & R. 505; *Britton v. Diersher*, 46 Mo. 592; *Owings v. Arnot*, 33 Mo. 406; *Handley v. Barrows*, 68 Mo. App. 623; *State v. Chick (Mo.)*, 48 S. W. Rep. 829; *United States Glass Co. v. Bottle Co.*, 89 Fed. Rep. 993.

⁴⁰ *Bank v. Hyde*, 131 Mass. 77; *Buckles v. Huff*, 53 Ind. 474; *Kaufmann v. Rowan*, 189 Pa. St. 121; *Wehr v. German Congregation*, 47 Md. 177.

alteration without the consent of the parties sought to be charged, extinguishes their liability.⁴¹ A surety is bound in the manner and to the extent provided in the obligation executed by him, and no further. He may stand upon its terms and any material alteration of the instrument without his consent discharges him.⁴² Thus, where a building is being erected for a party who is to pay in installments as the building progresses toward completion, and an installment is paid in advance to the contractor, who is under a bond, such payment in advance discharges the sureties on the bond.⁴³ Because in such case the surety may be deprived of the inducement which his principal would have to perform the contract in due time as is stipulated in the instrument, and thereby make the surety liable in damages for delay in completing the work on time.⁴⁴ If the surety agrees to the modification of contract he is still bound.⁴⁵ But where he does not agree to the alteration he is discharged. Thus, where several sureties execute a joint and several bond, limiting their liability in express terms, and then another surety as agreed executes it, but makes a material alteration as to his liability which appears on the face of the bond, and the obligee accepts it without objection, the first sureties are discharged from their obligation, and the latter surety, having executed as a joint and several bond, is also discharged.⁴⁶

§ 104. COMMERCIAL INSTRUMENTS.—Upon the ground of

⁴¹ Wood v. Steele, 6 Wall. 80; State v. Welbes (Neb.), 81 N. W. Rep. 629.

⁴² Tomlinson v. Simpson, 33 Minn. 443; Berkhead v. Brown, 5 Hill (N. Y.), 34; Simonson v. Grant, 36 Minn. 439; Draper v. Wood, 112 Mass. 315; Huff v. Cole, 45 Ind. 300; Newlan v. Harrington, 24 Ill. 206; Kincaid v. Yates, 63 Mo. 45; Ryan v. Morton, 65 Tex. 258; Whelen v. Boyd, 114 Pa. St. 228; People's Ins. Co. v. McDownell, 41 Ohio St. 650.

⁴³ Simonson v. Grant, 36 Minn. 439. See sec. 67.

⁴⁴ General Steam Nav. Co. v. Rolt, 6 C. B., N. S. 55; Calvert v. Dock Co., 2 Keen, 638; Leeds v. Dunn, 10 N. Y. 469.

⁴⁵ Jordan v. Walters (Iowa), 80 N. W. Rep. 530.

⁴⁶ Ellesmere Brewing Co. v. Cooper (1896), 1 Q. B. 75. In this case the surety executing last signed his name, after which he stated the amount of his liability, which was not the amount agreed upon at first.

public policy very slight alterations of negotiable paper are held to be material, and any change of date, or amount, or rate of interest, or place of payment, is held to discharge the parties to the instrument, without knowledge of, or consent to, such change, upon the ground that they are material alterations.⁴⁷ Commercial instruments of the class which pass from hand to hand are, on the ground of public policy, most zealously protected from spoliation. But it has been held that the addition of a signature of a surety to a promissory note, in the form of a joint promisor, without the consent of the maker, does not discharge him. Because neither the liability of the maker of the note, nor the effect of a mortgage given to secure it, was materially altered by the added signature.⁴⁸ And if the alteration in no way affects the bond, though made without the surety's knowledge, it will not discharge him.⁴⁹ Thus, where there is an independent collateral agreement between the principal and obligee, making more definite one of the clauses of the instrument, but not in any way changing or altering the instrument, and does not touch any of the provisions of the performance of which the surety has guaranteed, it is not sufficient to discharge him; because such an agreement makes no variation in the obligation or liability of the surety, and does not concern him, and leaves the original agreement intact.⁵⁰ And so an alteration of a note before delivery to make it conform to the intention of the parties, does not release the surety thereon, though made without his knowledge.⁵¹

§ 105. CHANGE OF DATE.—The alteration in the date of the instrument discharges the surety. Thus, an alteration in the date of a note so as to make it fall due one year later, is a

⁴⁷ Wood v. Steele, 6 Wall. 80.

⁴⁸ Mersman v. Werges, 112 U. S. 139. See sec. 110.

⁴⁹ United States Glass Co. v. Mathews, 89 Fed. Rep. 828.

⁵⁰ Smith v. United States, 2 Wall. 219; Wehr v. German Congregation, 47 Md. 177; Bank v. Hyde, 131 Mass. 77.

⁵¹ Mattingly v. Riley (Ky.), 49 S. W. Rep. 799.

material alteration as to the surety.⁵² So the change of the time of payment of a note from "one day" to "one year" after date, is such alteration as will discharge the surety.⁵³ But where the date is changed merely to correct a mistake and make the note such as both parties intended it to be, will not avoid the note in the hands of the indorsee.⁵⁴

§ 106. ALTERATION OF AMOUNT.—If the amount of a note is changed after delivery, the surety will be discharged.⁵⁵ So the alteration of an official bond decreasing the penalty after it is signed, without the obligors' consent, will relieve them of liability;⁵⁶ so an increase of the penalty will discharge the surety.⁵⁷ And when a surety on a note, complete in all its parts, permits his principal to take it to a bank to be discounted, who alters it to a larger amount and then has it discounted, the surety is not liable for the larger amount.⁵⁸ But the rule would be different if the surety had shown negligence in filling out the note.

§ 107. ALTERATION OF THE RATE OF INTEREST.—A change of the rate of interest in a note is a material alteration. And such alteration by the principal with the consent of the holder, but without the consent of the surety, discharges the surety, although without fraudulent intention.⁵⁹ The rule is the same, if the rate of interest is decreased.⁶⁰ So the alteration of a note

⁵² *Wyman v. Yeomans*, 84 Ill. 403; *Miller v. Gilliland*, 19 Pa. St. 119; *Stephens v. Graham*, 7 Serg. & R. 505.

⁵³ *Stayner v. Joice*, 82 Ind. 35.

⁵⁴ *Ames v. Colburn*, 11 Gray, 390.

⁵⁵ *Portage County Bank v. Lane*, 8 Ohio St. 495.

⁵⁶ *State v. Chick (Mo.)*, 48 S. W. Rep. 829; *Doane v. Eldridge*, 16 Gray, 254.

⁵⁷ *Dover v. Robinson*, 64 Me. 183.

⁵⁸ *Agawam Bank v. Sears*, 4 Gray, 95.

⁵⁹ *Harsh v. Klepper*, 28 Ohio St. 200; *Boalt v. Brown*, 13 Ohio St. 364; *Hart v. Clouser*, 30 Ind. 210; *Neff v. Horner*, 63 Pa. St. 327; *Jones v. Bangs*, 40 Ohio St. 139; *Marsh v. Griffin*, 42 Iowa, 403; *Wood v. Steele*, 6 Wall. 80.

⁶⁰ *Whitmer v. Frye*, 10 Mo. 348; *Post v. Losey*, 111 Ind. 71.

by the addition of the words "with interest" avoids the note as to the surety or joint promisor who did not consent thereto.⁶¹

§ 108. CHANGING THE PLACE OF PAYMENT.—If there is an alteration of the note by changing the place of payment without the consent of the surety, it will discharge him.⁶² It is the duty of the maker to seek the payee at the place designated, and the surety must see that the debt is paid, but if the place of payment is changed without his consent, his duties are thereby increased, and it will require a greater effort to find the payee.⁶³

§ 109. DESTROYING THE IDENTITY OF THE CONTRACT.—By destroying the identity of the contract, the surety is released. Hence, a material alteration of a note made by one of the promisors before its delivery, and without the knowledge of the other promisor, discharges the latter.⁶⁴ So the addition of "gold" to a promissory note payable in dollars, by the principal before delivery, without the consent of the surety, discharges the latter.⁶⁵ And any writing upon a note which seeks to make a guarantor a surety is material and releases the guarantor.⁶⁶ So where the payee of a note writes his own name under the maker's, and adds after his name "security," it avoids the note.⁶⁷ So inserting the words "or order" in a non-negotiable note is a material alteration and renders it void.⁶⁸ And the same is true where a qualified guarantee is made into an absolute guarantee.⁶⁹ So changing the payee in a note signed by a surety, discharges the surety.⁷⁰

⁶¹ *Fay v. Smith*, 1 Allen, 477; *Waterman v. Vose*, 43 Me. 504.

⁶² *Woodworth v. Bank*, 19 Johns. 420; *Nazro v. Fuller*, 24 Wend. 374; *Southwick Bank v. Grosse*, 35 Pa. St. 82; *Pahlman v. Taylor*, 75 Ill. 629; *Townsend v. Wagon Co.*, 10 Neb. 615.

⁶³ *Woodworth v. Bank*, 19 Johns. 420.

⁶⁴ *Draper v. Wood*, 112 Mass. 315.

⁶⁵ *Bogarath v. Breedlove*, 39 Tex. 561; *Hanson v. Crowley*, 41 Ga. 303; *Church v. Howard*, 17 Hun, 5.

⁶⁶ *Robinson v. Reid*, 46 Iowa, 219.

⁶⁷ *Chappell v. Spencer*, 23 Barb. 584.

⁶⁸ *Haines v. Dennett*, 11 N. H. 180.

⁶⁹ *Newlan v. Harrington*, 24 Ill. 206.

⁷⁰ *Bull v. Mahlin*, 69 Iowa, 408.

§ 110. ADDITION OF SURETY TO A NOTE.—Some courts hold, against the weight of authority, that where a promissory note is fully executed by the principal and surety and delivered to the payee, and thereafter, without the consent of the surety, the name of another surety is added thereto, as an additional surety, the first surety is discharged.⁷¹ But the better rule is that the addition of a surety on a promissory note without the consent of the maker or prior surety, does not discharge either of them.⁷² Because the signature added, although in the form of that of joint promisor, is in fact that of a surety or guarantor only, and the original maker is, as between himself and the surety, exclusively liable for the whole debt, and his ultimate liability to pay that amount is not increased nor diminished, and according to the general current of the American authorities, the addition of a name of a surety, whether before or after the first negotiation of the note, is not such an alteration as discharges the maker or the prior surety.⁷³

The English cases afford no sufficient ground for a different doctrine. In a decision at law it was held that the signing of a note by an additional surety without the consent of the original makers prevented the maintenance of an action on the note against them.⁷⁴ But in an earlier decision of equal weight, it was held that in such a case the addition did not avoid the note nor prevent the original surety on paying the note from recovering of the principal maker the amount.⁷⁵ And in a later case, the Court of Chancery, upon an appeal in bankruptcy, decided

⁷¹ *Dickerman v. Miner*, 43 Iowa, 508; *Hamilton v. Hooper*, 46 Iowa, 515; *Berreyman v. Manker*, 56 Iowa, 50; *Gardner v. Walsh*, 5 El. & Bl. 82; *Henry v. Coats*, 17 Ind. 162; *Chadwick v. Eastman*, 53 Me. 12; *Shipp v. Suggett*, 9 B. Mon. 5, 8; *Wallace v. Jewell*, 21 Ohio St. 163.

⁷² *Mersman v. Werges*, 112 U. S. 139.

⁷³ *Montgomery Railroad v. Hurst*, 9 Ala. 513; *Stone v. White*, 8 Gray, 589; *McCaughy v. Smith*, 27 N. Y. 39; *Brownell v. Winnie*, 29 N. Y. 400; *Miller v. Finley*, 26 Mich. 249. See, also, *Aldous v. Cornwall*, L. R. 3 Q. B. 573.

⁷⁴ *Gardner v. Walsh*, 5 El. & Bl. 83.

⁷⁵ *Cotton v. Simpson*, 8 Ad. & El. 136; 3 Nev. & Per. 248.

that the addition of a surety was not a material alteration of the original contract.⁷⁶

So, according to the latter rule, a mortgage executed by husband and wife on her land, for the accommodation of a partnership in which the husband is a member, and as security for the payment of a negotiable promissory note for the same purpose, and to which note the partner, before negotiating it, added the wife's name as a maker, with the consent or knowledge of herself or her husband, is not thereby avoided as against a party who, in ignorance of the note having been so altered, lends money to the partnership upon the security of the note and mortgage.⁷⁷

In Nebraska if other sureties sign a bond after it has been delivered, the prior sureties will be released and the latter held for subsequent default.⁷⁸

§ 111. CHANGING THE CONTRACT OF A LEASE SIGNED BY SURETY.—If the lessor and lessee change the covenants in a lease, without the surety's knowledge, he is discharged.⁷⁹ But the assignment of a lease by the lessee does not discharge either the lessee or his surety from the covenants, and it does not have this effect even when the lessor recognizes the assignment by accepting rent from the assignee.⁸⁰

But where the parties to the lease make a new contract, without the consent of the lessee's surety, the surety is discharged, as where the lease is surrendered for a consideration.⁸¹ But a surety cannot complain if the rent is reduced without his knowledge, as such reduction is equivalent to payment of the amount reduced.⁸² If the lessor takes back part of the land and reduces

⁷⁶ Ex parte Yates, 2 DeG. & J. 191.

⁷⁷ Mersman v. Werges, 112 U. S. 139.

⁷⁸ Stoner v. Keith Co., 48 Neb. 279.

⁷⁹ White v. Walker, 31 Ill. 422; Grant v. Smith, 46 N. Y. 95.

⁸⁰ Way v. Reed, 6 Allen, 364; Hunt v. Gardner, 39 N. J. L. 530; Olney v. Greene, 13 R. I. 350; Damb v. Hoffman, 3 E. D. Smith, 361; Grommes v. Trust Co., 147 Ill. 634.

⁸¹ Nichols v. Palmer, 48 Wis. 110.

⁸² Preston v. Huntington, 67 Mich. 139.

the rent on the remainder, this will release the surety.⁸³ As a general rule when the sureties' rights are in no way affected, they will not be discharged from the covenants in the lease.⁸⁴

§ 112. BUILDING CONTRACTS.—The doctrine that the liability of a surety is *strictissimi juris* means that a surety shall not be held beyond the precise terms of his contract, and not that a different rule must be applied in the construction of contracts of suretyship, than that which is to be applied in the construction in general. Thus, a bond executed by a contractor to secure the performance of a contract entered into for the construction of a building, and to pay debts incurred in the prosecution of the work, inures to the benefit of one furnishing labor and material in the construction of such building. The construction contract being a part of the bond, and it being provided therein that changes can be made in the plan and specifications of the building in the manner therein stated, the sureties thereby consented in advance to any departure from the original plans which were in the strict construction of the contract.⁸⁵ And in such agreements there are two contracts with one consideration to support both: (1) That the building shall be erected according to specifications; (2) that the employees of the contractor shall be paid. Hence, if the owner of the building makes a change in the contract as to the erection, that has no effect as to the employees of the contractor, and as to them the sureties are not discharged.⁸⁶ The bond being conditioned not only to protect the owner of the proposed building, but the material men and employees, the latter can sue on the bond for material furnished and labor performed.⁸⁷

In many States a third person, such as sub-contractors, laborers and material men, may maintain an action upon a bond given by a contractor to the State, county, city, or school dis-

⁸³ Penn v. Collins, 5 Rob. (La.) 213.

⁸⁴ Morgan v. Smith, 70 N. Y. 537.

⁸⁵ Smith v. Molleson, 148 N. Y. 241.

⁸⁶ Doll v. Crume, 41 Neb. 655; Lyman v. Lincoln, 38 Neb. 794.

⁸⁷ School Dist. v. Livers, 147 Mo. 580.

strict, conditioned for the faithful performance of a contract for a public improvement for the payment of all claims of such third persons, though not expressed in the bond, and a change in the contract with the principal does not discharge the sureties as to the vested rights of such third parties.⁸⁸

So a surety on a bond cannot be released from the original contract by a change in the agreement between the contractor and the owner of the building, and an action on the bond can be maintained against him by a material man for an unpaid amount due him on account of material furnished to the contractor.⁸⁹ Because the duties of the sureties in such cases of third parties are entirely independent of the owner's rights, and when the third party's rights are fixed they can be destroyed only by his own acts, and not by the acts of the principal debtor or contractor.⁹⁰

§ 113. **EXTENSION OF TIME OF PAYMENT.**—This subject has been fully treated under the headings of the liability of sureties, and so will be given but a short review in this connection. The law of suretyship forbids that there shall be between debtor and creditor any agreement that shall imperil the rights of the surety. Thus, a material man cannot hold the sureties liable on a contractor's bond, conditioned that the contractor shall make full payment to all persons supplying material, if he has extended the time of payment by taking notes due after the termination of the contract, as it deprives the sureties of the opportunity to compel appropriation of payments as made for claims for materials.⁹¹

In general, any extension of time upon a valid consideration

⁸⁸ *Baker v. Bryan*, 64 Iowa, 562; *Sample v. Hale*, 34 Neb. 221; *Korsmeyer, etc., Co. v. McCay*, 43 Neb. 649; *Kauffman v. Cooper*, 46 Neb. 644; *Devers v. Howard*, 144 Mo. 671; *St. Louis v. Von Phul*, 133 Mo. 561; *Knapp v. Swaney*, 56 Mich. 345; *Bank v. Winant*, 123 N. Y. 267.

⁸⁹ *Freeman v. Berkey*, 45 Minn. 438; *Abbott v. Morressette*, 46 Minn. 10; *Sepp v. McCann*, 47 Minn. 364; *School Dist. v. Livers*, 147 Mo. 580; *Henricus v. Engbert*, 137 N. Y. 488; *Dewey v. McCollum*, 91 Ind. 173.

⁹⁰ *Doll v. Crume*, 41 Neb. 655; *Conn v. State*, 125 Ind. 513; *Henricus v. Engbert*, 137 N. Y. 488; *Wilson v. Webber*, 92 Hun, 466; 157 N. Y. 693.

⁹¹ *United States v. Trust Co.*, 89 Fed. Rep. 921. See sec. 42 *et seq.*

between the creditor and debtor, without the surety's consent, will release him.⁹² But when the sureties sign as makers, and even if the payee knows that they are only sureties, an extension of the time by "the makers" will include them, so they will not be discharged.⁹³ And a mere indulgence to the debtor by the creditor will not discharge the sureties.⁹⁴ So when a collateral contract is made between the debtor and creditor to extend the time of payment, which is to relieve the surety, and the creditor stipulates that it shall not affect the original contract, the collateral contract does not release the surety.⁹⁵

The surety is discharged when the creditor, without his consent, gives time to the principal debtor for a valuable consideration, because in so doing he deprives the surety of the right he would have had from the mere fact of entering into the suretyship—namely, to use the name of the creditor to sue the principal debtor—and if this right be suspended for a day or an hour, and not injuring the surety at all, and even positively benefiting him, nevertheless, by the principle of equity, it is established that this discharges the surety altogether,⁹⁶ and also security given by a third party.⁹⁷

§ 114. CONSIDERATION.—What is a consideration that shall support an extension of time and thereby relieve the surety from liability has already been treated, and will only be noticed generally in this connection.

⁹² *Randolph v. Flemming*, 59 Ga. 776; *Home Nat. Bank v. Waterman*, 134 Ill. 461; *Post v. Losey*, 111 Ind. 74; *Morgan v. Thompson*, 60 Iowa, 352; *Rose v. Williams*, 5 Kan. 483; *Wilson v. Foot*, 11 Met. 285; *Jenkins v. Daniels*, 125 N. Car. 161; *Barrett v. Davis*, 104 Mo. 549; *Ducker v. Rapp*, 67 N. Y. 464; *Dillon v. Russell*, 5 Neb. 484; *Miller v. Shein*, 41 Ohio St. 376; *Grayson's Appeal*, 108 Pa. St. 581; *Mann v. Brown*, 71 Tex. 241; *Jaffray v. Crane*, 50 Wis. 349; *Bau v. Mackey*, 140 U. S. 220; *Clarke v. Birley*, 41 Ch. Div. 422.

⁹³ *Sawyer v. Campbell*, 107 Iowa, 397.

⁹⁴ *Wilson v. Webber*, 92 Hun, 466; 157 N. Y. 693; *Grier v. Flitcraft*, 57 N. J. Eq. 556.

⁹⁵ *Kaufmann v. Rowan*, 189 Pa. St. 121.

⁹⁶ *Polak v. Everett*, 1 Q. B. D. 669; *Rees v. Berrington*, 2 Ves. 540; *Greenwood v. Francis* (1899), 1 Q. B. 312; *Hallock v. Yankey*, 102 Wis. 41.

⁹⁷ *Jenkins v. Daniels*, 125 N. Car. 161. See sec. 42 *et seq.*

To have the effect to discharge a surety the agreement for extension of time of payment made by the creditor with the principal debtor without the consent of the surety, must be upon a valid consideration, such as will preclude the creditor from enforcing the debt against the principal until the time expires.⁹⁸ But the mere indulgence of the principal debtor by the creditor, without a binding contract therefor based on a valid consideration, will not discharge the surety.⁹⁹

A partial payment of a note before maturity is a good consideration, to extend the time to pay the balance, and will discharge the surety.¹⁰⁰ But where the partial payment is on a note overdue, it is not a valid consideration for the extension of the time to pay the balance, and such payment cannot therefore discharge the surety.¹⁰¹ The consideration need not be based upon a money consideration for the extension; a mutual promise is a sufficient consideration.¹⁰² And it is not necessary that the benefit inures to the surety direct. The surety may ratify an unauthorized act of his agent in signing his name to a bond.¹⁰³

§ 115. EFFECT ON SURETY'S CONTRACT BY TAKING USURY FOR EXTENSION.—While the agreement to pay usurious interest is executory as to both parties, it is void as to both, and does not discharge the surety on the debt.¹⁰⁴ But when the contract is

⁹⁸ *Olmstead v. Latimer*, 158 N. Y. 313; *Wendling v. Taylor*, 57 Iowa, 354; *Williams v. Jenson*, 75 Mo. 681; *Hogshead v. Williams*, 55 Ind. 145; *Bonner v. Nelson*, 57 Ga. 433; *Galbraith v. Fullerton*, 53 Ill. 126; *Brubaker v. Okeson*, 36 Pa. St. 519; *Hunter v. Clark*, 28 Tex. 139; *Fay v. Tower*, 58 Wis. 286.

⁹⁹ *First Nat. Bank v. Parsons* (W. Va.), 32 S. E. Rep. 271; *Lowman v. Yates*, 37 N. Y. 601; *Rucker v. Robinson*, 38 Mo. 154; *Kirby v. Studebaker*, 15 Ind. 45; *Love v. Brown*, 38 Pa. St. 307; *Reed v. Flipper*, 47 Ga. 273; *Lyle v. Moore*, 24 Ill. 95; *Davis v. Graham*, 29 Iowa, 514; *Vancil v. Hogler*, 27 Kan. 407.

¹⁰⁰ *Greely v. Dow*, 2 Met. 176; *Uhler v. Applegate*, 26 Pa. St. 140.

¹⁰¹ *Davis v. Stout*, 126 Ind. 11; *Petty v. Douglass*, 76 Mo. 70; *Ingles v. Sutliff*, 36 Kan. 444; *Halliday v. Hart*, 30 N. Y. 474.

¹⁰² *English v. Landon*, 181 Ill. 614.

¹⁰³ *Lynch v. Smyth*, 25 Colo. 103; *Drakely v. Gregg*, 8 Wall. 242.

¹⁰⁴ *Mieswindle v. Jung*, 30 Wis. 361; *Polkinghorne v. Hendricks*, 61 Wis. 366; *Pyle v. Clark*, 3 B. Mon. 262; *Scott v. Hall*, 6 B. Mon. 285; *Wittmer v.*

executed and the creditor has accepted the usurious interest for an extension of payment on the note, the surety is released.¹⁰⁵ But it is said where the usury causes only a forfeiture of all interest, the forbearance is therefore without consideration, and the surety is not discharged.¹⁰⁶

§ 116. EFFECT OF CREDITOR'S RESERVATION OF HIS REMEDIES AGAINST SURETY.—The creditor may reserve his remedies against the surety at the time of the extension, and, hence, not discharge the surety.¹⁰⁷ So an agreement upon a sufficient consideration by the creditor to release and discharge the principal debtor, but expressly reserving in such instrument or release as a part of the same transaction, the right of the creditor to proceed against the surety upon the bond of the same obligation, does not affect in equity, or at law, the continuing liability of the surety.¹⁰⁸

Such agreement does not operate as an absolute, but only as a conditional, suspension of the right. The stipulation in such cases is treated in effect as if it was made in express terms subject to the consent of the surety, and the surety is not thereby discharged.¹⁰⁹ So when a note is payable at a fixed future time, the surety is not discharged, if the right of an immediate action is reserved upon the debt, when it is extended by the creditor.¹¹⁰

Ellison, 71 Ill. 301; Galbraith v. Fullerton, 53 Ill. 126; Tudor v. Goodloe, 1 B. Mon. 322.

¹⁰⁵ Myers v. Bank, 78 Ill. 257; Danforth v. Semple, 73 Ill. 170; Cross v. Wood, 30 Ind. 378; Lemmon v. Whitner, 75 Ind. 318; Church v. Maloy, 70 N. Y. 63; Camp v. Howell, 37 Ga. 312; Blazer v. Beverly, 15 Ohio St. 57; Corielle v. Allen, 13 Iowa, 189; Glenn v. Magan, 23 W. Va. 467; Parsons v. Horrold (W. Va.), 32 S. E. Rep. 1002; Wild v. Home, 74 Mo. 551; Stillwell v. Aaron, 69 Mo. 539.

¹⁰⁶ Polkinghorne v. Hendricks, 61 Miss. 366.

¹⁰⁷ Kearsley v. Cole, 16 Mees. & W. 128; Bealer v. Mayor, 19 C. B., N. S. 76; Tobey v. Ellis, 114 Mass. 120; Hagey v. Hill, 75 Pa. St. 108; Mueller v. Dobschuetz, 89 Ill. 176; Rucker v. Robinson, 38 Mo. 154.

¹⁰⁸ Parmalee v. Lawrence, 44 Ill. 405; Dupee v. Blake, 148 Ill. 453; Rockville Nat. Bank v. Holt, 58 Conn. 526; Jones v. Sarchett, 61 Iowa, 520.

¹⁰⁹ Calvo v. Davies, 73 N. Y. 217; Morgan v. Smith, 70 N. Y. 537.

¹¹⁰ Paine v. Voorhees, 26 Wis. 522; United States v. Hodge, 6 How. 279; Wyke v. Rogers, 1 DeGex, M. & G. 408; Fox v. Parker, 44 Barb. 541; Owen

§ 117. **EXTENSION WITH CONSENT OF SURETY.**—Whenever the creditor gives time and makes a new contract with the principal debtor, of which new contract the surety has knowledge and to which he assents, he is not thereby discharged.¹¹¹ By the common law, when action is upon a specialty contract, the surety cannot set up a parol agreement to enlarge the time without his consent as a defense, for such is for a court of equity.¹¹²

A surety cannot be discharged where he induces the extension of time upon a valuable consideration, or connives with that intention.¹¹³

§ 118. **WAIVER OF DISCHARGE.**—The surety may waive his discharge. Thus, after his discharge with knowledge that he is no longer liable, if he promises to pay the debt he is then bound for its payment.¹¹⁴ So, if a surety, after time given by the creditor to the principal, promises to pay the debt with knowledge of the fact, he is liable without any new consideration for the promise. He will be bound upon the original consideration, and not upon the new promise.¹¹⁵

§ 119. **EXTENSION MUST BE FOR A TIME CERTAIN.**—In order that an extension of time of payment may release a surety, it must appear that it was for a time certain and without the surety's consent.¹¹⁶ So an agreement for the extension of time between the payee and principal maker of a promissory note

v. Houran, 13 Beav. 196; *Price v. Barker*, 4 El. & B. 760; *Viele v. Hoag*, 24 Vt. 46; *Webb v. Hewitt*, 3 Kay & J. 438; *Hutchinson v. Wright*, 61 N. H. 108.

¹¹¹ *Klein v. Long*, 27 App. D. 158; *Adams v. Way*, 32 Conn. 160; *Corlies v. Estes*, 31 Vt. 653; *Smith v. Winter*, 4 Mees. & W. 454; *Rockville v. Holt*, 58 Conn. 526; *Osgood v. Miller*, 67 Me. 174; *Crosby v. Wyatt*, 10 N. H. 318.

¹¹² *Davy v. Pendergrass*, 5 Barn. & Al. 187; *Parker v. Watson*, 8 Exch. 409; *Loop v. United States*, 3 Mason, 446; *Wittmer v. Ellison*, 72 Ill. 301.

¹¹³ *Williams v. Gooch*, 73 Ill. App. 557.

¹¹⁴ *First Nat. Bank v. Whitman*, 66 Ill. 33; *Rindskopf v. Doman*, 28 Ohio St. 516.

¹¹⁵ *Porter v. Hodenpuyl*, 9 Mich. 11; *Sigourney v. Wetherell*, 6 Met. 553; *Bank v. Johnson*, 9 Ala. 622; *Fowler v. Brooks*, 13 N. H. 240.

¹¹⁶ *Olson v. Chism*, 21 Ind. App. 40; *Gardner v. Watson*, 13 Ill. 347; *Flynn v. Mudd*, 27 Ill. 323.

must be for a definite time in order that it may work a release of the surety;¹¹⁷ it must not only be binding in law, but time of extension must be precisely fixed,¹¹⁸ because if a definite time is not fixed, the creditor can proceed at any time to collect the debt.

§ 120. GIVING TIME TO ONE OF TWO OR MORE SURETIES.—Giving time to one of two or more sureties on a promissory note does not discharge the others.¹¹⁹ Because the mere giving of time to one of two or more obligors whose obligations are equal, will not discharge the others.¹²⁰ For giving time by oral agreement to one of two sureties cannot have any greater legal effect than a covenant by a grantor not to sue for a specified time, one of two or more joint debtors. Such covenant is not a release, and it furnishes no defense to the other debtors.¹²¹ Where a note is given by several parties, though part of them are in fact sureties for the others, yet if that does not appear upon the face of the note, the payee does not discharge the sureties by giving time to the principal debtor, unless he has knowledge at the time of so doing that the other makers were sureties.¹²² But if a judgment creditor extends the time for payment as to one of two judgment debtors, the creditor knowing that the other was surety for the one to whom he extended the time, the surety is discharged.¹²³

§ 121. WHAT IS A PROMISE OF EXTENSION.—A promise of extension upon a note, in order to discharge the surety thereto, must be such as will prevent the holder from bringing action against the principal. So taking interest in advance will not

¹¹⁷ *Morgan v. Thompson*, 60 Iowa, 280; *Jenkins v. Clarkson*, 7 Ohio, 72.

¹¹⁸ *Miller v. Stern*, 2 Pa. St. 286; *Hayes v. Wells*, 34 Md. 512; *Woolfolk v. Plant*, 46 Ga. 422; *Worthington v. Gay*, 7 Sm. & M. 522.

¹¹⁹ *Draper v. Wild*, 13 Gray, 580.

¹²⁰ *Dunn v. Slee*, Holt, N. P. 399; 1 Moore, 2.

¹²¹ *Shed v. Pierce*, 17 Mass. 628; *Wilson v. Foot*, 11 Met. 285.

¹²² *Wilson v. Foot*, 11 Met. 285; *Mullendore v. Wertz*, 75 Ind. 431.

¹²³ *Gibson v. Ogden*, 100 Ind. 20.

constitute such promise.¹²⁴ In order to discharge the surety the contract must be such as will prevent the holder from suing the principal before the expiration of the time alleged for the extension.¹²⁵ This is on the principle that an express covenant not to sue the principal debtor, for a certain or prescribed time, will not discharge the surety, because, notwithstanding the agreement, suit may be brought at any time, and the covenant is no bar, but only gives the covenantee an action for damages.¹²⁶ When time is given to the principal debtor by a valid agreement which ties up the hands of the creditor, the surety is discharged. For if, notwithstanding such contract, it were competent to sue the surety, the latter would immediately have his remedy over against the debtor.¹²⁷

§ 122. ACCEPTING NEW NOTE.—The surety is discharged when the creditor accepts a new note payable at a future time, because if the agreement to extend is not expressed it will be implied.¹²⁸ Thus, taking two renewal notes from the principal debtor by way of conditional payment of an existing note and receipt of interest in advance upon it, amounts to an extension of the original, and effects discharge of the surety.¹²⁹ The taking of a new note implies an agreement to give time on the old.¹³⁰ The acceptance by the creditor of a valid obligation payable in the future, operates to suspend all rights of action on the consideration for which it is given until the time fixed for the payment

¹²⁴ *Hosea v. Rowley*, 65 Mo. 357; *Oxford Bank v. Lewis*, 8 Pick. 458.

¹²⁵ *Blackstone Bank v. Hill*, 10 Pick. 153.

¹²⁶ *Perkins v. Gilman*, 8 Pick. 229; *Fallerm v. Valentine*, 11 Pick. 156; *Doe v. Tuttle*, 4 Mass. 414.

¹²⁷ *Clippinger v. Cress*, 2 Watts, 45; *First Nat. Bank v. Leavitt*, 65 Mo. 562.

¹²⁸ *Fellows v. Prentiss*, 3 Denio, 512; *Place v. McIlvain*, 38 N. Y. 96; *Hubbard v. Gurney*, 64 N. Y. 457.

¹²⁹ *First Nat. Bank v. Leavitt*, 65 Mo. 562; *Greene v. Bates*, 74 N. Y. 33; *Robinson v. Offutt*, 7 T. B. Mon. 540; *Walters v. Swallow*, 6 Whart. 446.

¹³⁰ *Myers v. Welles*, 5 Hill (N. Y.), 463; *Appleton v. Parker*, 15 Gray, 173; *Weed Sewing Mach. Co. v. Aberrecht*, 38 Wis. 325; *Slagle v. Pow*, 41 Ohio St. 603.

of the obligation, and, hence, discharges the surety on the original obligation.¹³¹

However, there are decisions which hold that the mere fact that the creditor takes a new note payable after maturity of the original debt, raises no implication in law that he agrees to give time for the payment of the original note, and that the agreement to give time must be proved as a fact.¹³²

§ 123. TAKING COLLATERAL SECURITY.—Taking collateral security by the creditor or holder of the note in addition from the maker of the instrument, does not release the indorser or surety. And it is not material of what character the collateral security may be. It may consist of promissory notes not due, a mortgage payable in the future, or anything else, which does not affect the remedy on the original contract. This can only be done by agreement for a valuable consideration. The remedy on the collateral instrument is wholly immaterial unless it discharges or postpones the original obligation. Thus, taking a mortgage from the principal debtor as to which time is given for payment, but which is only collateral security for the debt, and there being no agreement for a valuable consideration to give time to the debtor personally, does not discharge the sureties.¹³³ So a holder of a bill of exchange, by taking collateral security of the drawer, not giving time, does not release the endorser.¹³⁴ So if a second bond is given to the obligee merely as a collateral security for the prior bond, such bond will not be deemed ex-

¹³¹ *Chickasaw County v. Pitcher*, 36 Iowa, 593; *Simmons v. Guise*, 46 Ga. 473; *Greene v. Bates*, 74 N. Y. 333; *Walton v. Mascal*, 13 Mees. & W. 452; *Price v. Price*, 16 Mees. & W. 232; *Baker v. Walker*, 14 Mees. & W. 465; *Stuart v. Lancaster*, 84 Va. 772; *Smarr v. Schnitter*, 38 Mo. 478; *Rittenhouse v. Kemp*, 37 Ind. 258.

¹³² *Weakley v. Bell*, 9 Watts, 273; *Shaw v. Church*, 39 Pa. St. 226; *Bing v. Clarkson*, 2 Barn. & Cr. 14. See, also, *Wells v. Hurst*, 101 Tenn. 656.

¹³³ *United States v. Hodge*, 6 How. 279; *German Savings Inst. v. Vahle*, 28 Ill. App. 557; *Burke v. Crurer*, 8 Tex. 66; *Brengle v. Bushey*, 40 Md. 141.

¹³⁴ *James v. Badger*, 1 Johns. Cas. 131; *Hurd v. Little*, 12 Mass. 502.

tended, because that which is taken merely as collateral security has time to run before it falls due.¹³⁵

§ 124. PERSONAL JUDGMENT FOR DEFICIENCY IN FORECLOSURE.—It is the rule that a judgment or decree against one of two or more joint principals or sureties releases the others. A deficiency decree in foreclosure proceedings is, in effect, a personal judgment upon the note, and where the court renders judgment against one of several makers, this extinguishes the creditor's, or mortgagee's right, as to the others. Even if the note is joint and several, and where it may be sued severally, yet where all are sued as joint makers and judgment is taken against one, the other makers, by this action, are released.¹³⁶ Thus, one who, though made a party defendant to foreclosure proceedings, is a joint maker of the secured note, and is not held in the deficiency decree, will be released, although as between him and the party held by the judgment in the decree he is liable on the note, as surety.¹³⁷

§ 125. FRAUD—EXTENSION OF TIME.—A fraud of the principal debtor unknown to the creditor, extending the time, will not release the surety. Thus, where the maker of a promissory note procures its surrender and extension of time by giving a new note to which he has forged the sureties' names, will not discharge the sureties on the surrendered note, because the note had never been legally extended as to payment.¹³⁸ But if the payee had discovered the fraud, and holds the substituted note without informing the sureties of the fraud, and they are injured, then their liability ceases. In such case the creditor waives the fraud and holds new note for the debt.¹³⁹ So taking a note with forged indorsements, in renewal of another note dis-

¹³⁵ *Remsen v. Graves*, 41 N. Y. 471; *Clarke v. Birley*, 41 Ch. D. 422; *Merriman v. Barker*, 121 Ind. 74. Compare *Haubest v. Kraus*, 4 Phil. 119.

¹³⁶ *Lawrence v. Beecher*, 116 Ind. 312.

¹³⁷ *Travelers Ins. Co. v. Mayo*, 170 Ill. 498.

¹³⁸ *Hobhard v. Hart*, 71 Iowa, 668. See, also, *Wheeler v. Bank (Ky.)*, 49 L. R. A. 315 and note.

¹³⁹ *Kirby v. Landis*, 54 Iowa, 150.

counted at a bank, does not extinguish the prior note, and, hence, the sureties on it are not discharged.¹⁴⁰

§ 126. FRAUD TO INDUCE SURETY TO SIGN CONTRACT.—If the surety is induced to sign a contract by fraud of the obligee, he is not liable. If the creditor makes use of any artifice to deceive the surety, and he is thereby deceived and signs the instrument, the creditor cannot hold him liable.¹⁴¹ And so if the surety is induced to become such by fraud perpetrated on him by the creditor, as by false representations as to material facts, the surety is not liable.¹⁴²

If the creditor knows or has good grounds for believing that the surety has been deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing the risks of which he has knowledge, and he has an opportunity before accepting his undertaking to inform him of such facts, good faith and fair dealing demand that he should make such disclosure to him. If he accepts the contract without doing so, the surety may afterwards avoid such execution of the instrument as a fraud.¹⁴³ However, if there is nothing in the circumstances to indicate that the surety is being misled or deceived, or that he is entering into the contract in ignorance of facts materially affecting its risk, the creditor is not bound to seek him out or, without being applied to, communicate to him information as to facts within his knowledge. In such case he may assume that the surety has obtained information for his guidance from other sources, or that he has chosen to assume the risks of undertaking, whatever they may be.¹⁴⁴

¹⁴⁰ *Ritter v. Singmaster*, 73 Pa. St. 400.

¹⁴¹ *Roper v. Sangamon Lodge*, 91 Ill. 518; *Ham v. Greve*, 34 Ind. 18; *Trammell v. Swan*, 25 Tex. 473.

¹⁴² *Evans v. Keeland*, 9 Ala. 42; *Waterbury v. Andrews*, 67 Mich. 281; *Bank v. Railway Co.*, 65 Iowa, 692.

¹⁴³ *Booth v. Storrs*, 75 Ill. 438; *Ham v. Greve*, 34 Ind. 18; *Pidock v. Bishop*, 3 Barn. & Cr. 605; *Owen v. Homan*, 4 H. L. Cas. 997; *Hamilton v. Watson*, 12 Cl. & F. 109.

¹⁴⁴ *Bank v. Railway Co.*, 65 Iowa, 692; *Graves v. Bank*, 10 Bush, 23; *Railton v. Mathews*, 10 Cl. & F. 934.

A surety or guarantor cannot interpose the fraudulent or false representation of his principal as a defense to the payment of a note, without connecting the payee with such representations;¹⁴⁵ the surety is not relieved if the false representations are made by a third person.¹⁴⁶

§ 127. NOTICE TO CREDITOR OF PRINCIPAL DEBTOR'S DISHONESTY.—In many cases a bond is given for the fidelity of the employee, who becomes dishonest, which is known to the employer; in such case it is the employer's duty to inform the surety. If the employer continues the dishonest employee in his service without giving notice to the surety, then the surety is not liable for any loss arising from the dishonesty of the employee during his subsequent service. But this rule has no application to cases of mere breach of duty or contract obligations on the part of the employee, not involving dishonesty on his part, or fraud or concealment on the part of the employer.¹⁴⁷ The mere fact that the creditor had knowledge that the employee, who was a collection agent, failed to remit the money collected, does not impose upon the obligee the duty to notify the surety.¹⁴⁸ It is a breach of good faith for the employer or obligee to continue the servant in a place of trust after discovering his dishonesty or defalcation, which is presumptively and in fact unknown to the surety, and without notifying the surety of the fact, giving him an opportunity to elect as to whether he will continue the risk.¹⁴⁹

¹⁴⁵ *Ladd v. Board*, 80 Ill. 233; *Rothermal v. Hughes*, 134 Pa. St. 510; *Lucas v. Owens*, 113 Ind. 521.

¹⁴⁶ *Brown v. Davenport*, 76 Ga. 799; *Soog v. State*, 39 N. J. L. 135.

¹⁴⁷ *Home v. Farrington*, 82 N. Y. 121; *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85; *Charlotte v. Gow*, 59 Ga. 685; *Saint v. Wheeler*, 95 Ala. 362; *Richmond v. Kasey*, 30 Gratt. 218; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277.

¹⁴⁸ *Aetna Ins. Co. v. Fowler*, 108 Mich. 557; *Atlantic, etc., Tel. Co. v. Barnes*, 64 N. Y. 385; *Cumberland Build. and Loan Asso. v. Gibbs (Mich.)*, 78 N. W. Rep. 138.

¹⁴⁹ *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Connecticut Mut. Ins. Co. v. Scott*, 81 Ky. 540.

§ 128. NEGLIGENCE OF CREDITOR IN NOT AVAILING HIMSELF OF THE DEBTOR'S MEANS.—It is settled law that when a creditor has means of satisfying the debt, either actually or potentially, in his control or within his possession as security, and he does not choose to retain it and relinquishes it, the surety is discharged.¹⁵⁰ And so in some States, where the estate of a deceased person is sufficient to pay all claims, the failure of a holder of the decedent's note to file the same as a claim against the estate, will operate to release the surety thereon.¹⁵¹ But this does not appear to be the general rule.¹⁵²

§ 129. SURETY SIGNING UPON CONDITION.—A surety may sign upon the understanding that certain conditions shall be performed before he shall become liable; and if the creditor knows of these conditions, and they are not fulfilled, the surety is discharged.¹⁵³ And so a guarantor signing a guaranty of the payment of a draft or bill, has the right to impose as a condition to its acceptance, or binding force on him, that a certain other person named shall become his co-guarantor, and the acceptance by the obligee with notice of the condition will create no liability on such guaranty if the condition is not performed.¹⁵⁴ Because in such cases of guaranty or suretyship, the surety can sign upon condition, and if such condition is known to the obligee, he takes the instrument and is a party to the contract, and a contract exists between him and the surety that it shall be fulfilled before he becomes liable; if not fulfilled the surety is discharged.¹⁵⁵

¹⁵⁰ *Reed v. Garvin*, 12 Serg. & R. 100; *Hutchinson v. Woodwell*, 107 Pa. St. 509.

¹⁵¹ *Waughop v. Bartlett*, 165 Ill. 124.

¹⁵² *Moore v. Gray*, 26 Ohio St. 525; *Jackson v. Benson*, 54 Iowa, 654.

¹⁵³ *Caldwell v. Heitahu*, 9 Watts & S. 51; *State v. Welbes* (S. Dak.), 81 N. W. Rep. 629; *Jones v. Keer*, 30 Ga. 93; *Cunningham v. Wrenn*, 23 Ill. 64; *Clay v. Edgerton*, 19 Ohio St. 549; *Linn County v. Farris*, 52 Mo. 75; *Milliken v. Callahan*, 69 Tex. 205.

¹⁵⁴ *Belleville Sav. Bank v. Bornman*, 124 Ill. 200.

¹⁵⁵ *Rhode v. McLean*, 101 Ill. 467; *Hull v. Parker*, 37 Mich. 590; *Benton v. Martin*, 52 N. Y. 570; *Lovell v. Adams*, 5 Humph. 133; *Gibbs v. Johnson*, 63 Mich. 671; *Miller v. Stern*, 12 Pa. St. 383.

§ 130. SURRENDERING SECURITY.—The right of a surety does not depend upon the contract, but upon the equities arising out of the circumstances of the case, and the creditor is affected by knowledge of the true relation of the debtors acquired at any time before he does the act which alters the position of the surety; and one who makes a promissory note for the accommodation of another is a surety within this rule.¹⁵⁶ Hence, if the creditor has taken a lien on property for the debt, or has taken the property of the principal for the benefit of himself and surety, and then releases the lien or gives up the property without the consent of the surety, the surety is discharged to the extent of such lien or property.¹⁵⁷ So the surety is entitled to collateral security received by the creditor from the principal debtor, and if the creditor, knowing the relations between the debtors, surrenders part of such property or security without the consent of the surety, the surety is discharged to that extent, although the relation of debtor and creditor does not appear on the face of the debt,¹⁵⁸ because the surety is entitled to be subrogated to all the rights and securities of the creditor.¹⁵⁹ And if in releasing the collateral or lien a material alteration is made in the contract, the surety is absolutely released.¹⁶⁰ But the surety is not discharged by the act of the creditor in releasing the security, to which the principal debtor had no title.¹⁶¹

§ 131. TAKING PROPERTY BY ATTACHMENT AND EXECUTION.

—The creditor can acquire possession of property by attachment or by levy of execution, and when he has thus acquired posses-

¹⁵⁶ *Bradford v. Hubbard*, 8 Pick. 155.

¹⁵⁷ *Bronson v. Machine Co.*, 105 Ga. 342; *Kirkpatrick v. Howk*, 80 Ill. 122; *Hoss v. Crouch* (Tenn.), 48 S. W. Rep. 724; *Baker v. Briggs*, 8 Pick. 122; *Rogers v. Trustees*, 46 Ill. 428; *Neff's Appeal*, 9 Watts & S. 36; *Bank v. Griford*, 79 Iowa, 300.

¹⁵⁸ *Guild v. Butler*, 127 Mass. 386.

¹⁵⁹ *Bangs v. Strong*, 4 N. Y. 315; *Hodgson v. Shaw*, 3 Mylne & K. 183; *Cummings v. Little*, 45 Me. 183; *Saline County v. Brice*, 65 Mo. 63.

¹⁶⁰ *Polak v. Everett*, 1 Q. B. D. 669; *Watts v. Shuttleworth*, 7 Hurl. & N. 353.

¹⁶¹ *First Nat. Bank v. Parsons* (W. Va.), 32 S. E. Rep. 271.

sion, he should not afterwards in any manner relinquish the same or consent to a course of proceedings that will have that effect; and if he does so the surety will be discharged to the extent corresponding with the value of the property released.¹⁶² But when the execution creates no lien upon the property, if no levy is made, the delay of the creditor to have it levied will not release the surety.¹⁶³ But if the execution, as soon as issued, becomes a lien upon the property, then the surety is released, if the creditor abandons the proceedings, to the amount which could be realized by the levy and sale of the property.¹⁶⁴

Where the statute does not intervene, the liability of the surety is not changed by the insolvency and discharge of the principal in the bond.¹⁶⁵ So when the attachment has gone to judgment, and then the principal is discharged in bankruptcy or insolvency, the surety is still liable,¹⁶⁶ because the bond is not affected by contingencies which might have destroyed the attachment if no bond had been given.¹⁶⁷ But an execution levied upon property, the sale of which would bring no returns, may be abandoned without discharging the surety.¹⁶⁸

§ 132. FAILURE TO APPLY SECURITIES.—The delay in applying securities, or not applying them at all, may discharge the surety. So when the creditor recovers a judgment against the debtor and surety, and execution is levied upon the principal's property, and then the creditor releases such property, the surety

¹⁶² *Maquoketa v. Willey*, 35 Iowa, 323; *Templeton v. Shakley*, 107 Pa. St. 370; *Sherraden v. Parker*, 24 Iowa, 28.

¹⁶³ *Brown v. Chambers*, 63 Tex. 131; *Crawford v. Gaulden*, 33 Ga. 173; *Jerauld v. Trippet*, 62 Ind. 122; *Manice v. Duncan*, 12 La. Ann. 715; *Hunter v. Clark*, 28 Tex. 163; *Morrison v. Bank*, 65 N. H. 253.

¹⁶⁴ *Robeson v. Roberts*, 20 Ind. 155.

¹⁶⁵ *Gass v. Smith*, 6 Gray, 112.

¹⁶⁶ *Bernheimer v. Charak*, 170 Mass. 179; *Rosenthal v. Perkins*, 123 Cal. 240; *McCombs v. Allen*, 82 N. Y. 114; *Easton v. Ormsby*, 18 R. I. 309.

¹⁶⁷ *Bernheimer v. Charak*, 170 Mass. 179.

¹⁶⁸ *Moss v. Pittinger*, 3 Minn. 217; *Commercial Bank v. Bank*, 11 Ohio, 444; *Moss v. Craft*, 10 Mo. 720. See sec. 213 *et seq.*

is discharged to extent of the value of such property;¹⁶⁹ loss of securities by the negligent act of the creditor releases the surety to the extent of such loss.¹⁷⁰ So where a creditor receives notes, mortgages, or property, in pledge for a debt, such securities must be regarded as an indemnity to the creditor, and to the person who may have become bound as surety for the original debt, and the surety has the right to exact of the creditor proper care and diligence in the management and collection of the collaterals, and any waste or misapplication of the collateral security will operate as a release of the surety to the amount of the loss actually sustained.¹⁷¹

§ 133. RELEASE OF CO-SURETY.—Co-sureties are liable to contribution among themselves, and so a discharge of one of them from his obligation, if the others are not discharged, will not release him from the liability to contribute for their indemnity.¹⁷² Where the release of one of several co-obligors shows upon its face, in connection with the surrounding circumstances, that it was the intention of the parties not to release his co-obligors, such intention will be carried out.¹⁷³ So in relation to sureties; and a receipt by the creditor to a surety of one-half of the amount due on a joint and several bond, does not release the other surety, but he is liable for only one-half of the original debt.¹⁷⁴ That is, when the obligation of the sureties is joint and several, the discharge of one of them does not release the others from payment of their proper proportion of the debt.¹⁷⁵ Thus, where one of two sureties is released from liability, it relieves the other surety from liability for one-half of the debt,

¹⁶⁹ *Dixon v. Ewing*, 3 Ohio, 280; *Hubbell v. Carpenter*, 5 Barb. 520; *Day v. Ramey*, 40 Ohio St. 446.

¹⁷⁰ *Barrett v. Bass*, 105 Ga. 421.

¹⁷¹ *Phares v. Barbour*, 49 Ill. 379; *Hall v. Hoxsey*, 84 Ill. 616; *Crim v. Fleming*, 101 Ind. 154; *Bank v. Gifford*, 79 Iowa, 300; *Black River Bank v. Page*, 44 N. Y. 453.

¹⁷² *Clapp v. Rice*, 15 Gray, 557.

¹⁷³ *Parmaler v. Lawrence*, 44 Ill. 405; *Moore v. Stanwood*, 98 Ill. 605.

¹⁷⁴ *Schock v. Miller*, 10 Pa. St. 401.

¹⁷⁵ *Glasscock v. Hamilton*, 62 Tex. 143.

that being the proportion which the surety who is released would have to pay as between himself and his co-surety, had he not been released.¹⁷⁶ But when the debt is joint, the release of one joint debtor discharges the others, and extrinsic evidence will not be admitted to explain the contract as a covenant not to sue.¹⁷⁷

§ 134. FAILURE OF CREDITOR TO SUE PRINCIPAL.—Mere forbearance or indulgence by a creditor to sue a principal will not release the surety. Because the surety is not put to any hazard by forbearance of the creditor, as he has it in his power to protect himself. He may either pay the debt, and thus become subrogated to the rights of the securities of the creditor, or he may compel the creditor to sue. Mere delay in enforcing the debt against the principal without fraudulent connivance between the maker and payee, does not release the surety; otherwise if there is an agreement on a new consideration for an extension.¹⁷⁹ And the surety is not discharged by the creditor's act in agreeing to continue the suit against the principal where the surety is not actually prejudiced thereby.¹⁸⁰

§ 135. DISAFFIRMANCE OF CONTRACT BY PRINCIPAL.—Principals under disability may disaffirm their contract when the disability is removed. The general rule is that where a party becomes surety for an infant or other party under disability, he is bound, though his principal is not.¹⁸¹ But to this rule there are excep-

¹⁷⁶ *Hallock v. Yankey*, 102 Wis. 41; *Waggoner v. Dyer*, 11 Leigh, 384; *Klingensmith v. Klingensmith*, 31 Pa. St. 460; *Ide v. Churchill*, 14 Ohio St. 372; *Gosserand v. LaCour*, 8 La. Ann. 75; *Walch v. Miller*, 61 Ohio St. 462.

¹⁷⁷ *Clark v. Mallory*, 185 Ill. 227.

¹⁷⁸ *Villars v. Polner*, 67 Ill. 204; *Bank v. State*, 62 Md. 88; *Eickhoff v. Eickenbary*, 52 Neb. 332; *Bell v. Walker*, 54 Neb. 222; *Marshall v. Hudson*, 9 Yerg. 58; *Field v. Brokaw*, 148 Ill. 654; *Bull v. Coe*, 77 Cal. 54; *Board v. Bank (Minn.)*, 77 N. W. Rep. 815.

¹⁷⁹ *Grier v. Flitercroft (N. J. Ch.)*, 41 At. Rep. 425.

¹⁸⁰ *First Nat. Bank v. Parsons (W. Va.)*, 32 S. E. Rep. 271; *Eickhoff v. Eickenbary*, 52 Neb. 332.

¹⁸¹ *Jones v. Crossthwait*, 17 Iowa, 393; *Allen v. Berryhill*, 27 Iowa, 534.

tions. Thus, when the principal has the right to disaffirm the contract, and returns the consideration received under it, the surety is thereby discharged.¹⁸² And so a surety upon a promissory note of a minor is not liable thereon, where the minor, upon attaining his majority, disaffirms the contract and returns the property for the purchase price for which the note was given.¹⁸³

§ 136. FRAUD UPON THE PRINCIPAL.—The right of the surety to plead that the contract of his principal was procured by fraud is a question upon which the courts are divided. Many courts hold that the plea is personal to the principal, while others sustain the right of the surety to maintain such defense. So in some States sureties cannot plead duress or fraud upon their principal in discharge of their liability.¹⁸⁴ On the other hand, it is held that the defense that a contract was fraudulent as to the principal may be pleaded by the surety.¹⁸⁵

§ 137. SUBSTITUTION OF SECURITIES.—A surety is not released by the substitution by the creditor of one collateral security for another, when made in good faith, apparently for the benefit of all concerned.¹⁸⁶ Thus, the release of part of certain real estate in order to make a title to one who purchases it for full value, upon condition that the purchase money should be applied to the extinguishment of a mortgage that was a prior lien upon the whole estate, does not release the surety, because the transaction bettered his condition.¹⁸⁷ So the surrender of a life policy held as collateral, upon receipt of its present value,

¹⁸² *Baker v. Kennett*, 54 Mo. 82; *Patterson v. Cone*, 61 Mo. 439; *Keokuk County State Bank v. Hall*, 106 Iowa, 540.

¹⁸³ *Baker v. Kennett*, 54 Mo. 82; *Keokuk County State Bank v. Hall*, 106 Iowa, 540.

¹⁸⁴ *Plummer v. People*, 16 Ill. 358; *Peacock v. People*, 83 Ill. 331; *Robinson v. Gould*, 11 Cush. 55; *Thompson v. Lockwood*, 15 Johns. 259.

¹⁸⁵ *Strong v. Grannis*, 26 Barb. 122; *Osborn v. Robbins*, 36 N. Y. 365; *Fisher v. Shattuck*, 17 Pick. 252; *Griffith v. Sitgreaves*, 90 Pa. St. 161.

¹⁸⁶ *State Bank v. Smith*, 155 N. Y. 185.

¹⁸⁷ *Neff's Appeal*, 9 Watts & S. 36.

after the principal had become bankrupt, and it is doubtful whether he could keep up the policy, does not discharge the surety.¹⁸⁸ So where a creditor releases a levy on property of the principal debtor, worth \$90, in consideration of an order worth \$100, that could not have been reached by execution, it does not discharge the surety, because he is benefited by the transaction.¹⁸⁹ And so the diversion of securities which results in no injury to the surety does not affect his liability for payment of the debt, if the accompanying right of subrogation would be of no value.¹⁹⁰

§ 138. PAYMENT OF CONSIDERATION IN INSTALLMENTS—BUILDING CONTRACTS.—Where a contract is paid in installments, the installments must be made as stipulated, and not in advance. Thus, a surety on a building contract, where the principal is to be paid in installments, will be discharged if the principal is paid faster than the contract provides.¹⁹¹ So by paying a party an installment before it is due under the contract, the owner of the building discharges the surety of the contractor from his obligations.¹⁹² Such payment is prejudicial to the surety, because it diminishes the security which the owner had and which he should have availed himself of to the benefit of the surety, and hence, the surety is damaged to the amount of the payment in advance, and therefore discharged.¹⁹³ So in building contracts, if the contractor is paid in advance instead of by installments as the work progresses, the sureties are thereby discharged.¹⁹⁴ But it is held if the sureties can receive no injury

¹⁸⁸ *Coates v. Coates*, 33 Beavan, 249.

¹⁸⁹ *Thomas v. Cleveland*, 33 Mo. 126.

¹⁹⁰ *Blydenburgh v. Bingham*, 38 N. Y. 371.

¹⁹¹ *General Steam Nav. Co. v. Rolt*, 6 C. B., N. S. 550; *Calvert v. Dock Co.*, 2 Keen, 638.

¹⁹² *Welch v. Hubchmitt*, 61 N. J. L. 57.

¹⁹³ *Chester v. Leonard*, 68 Conn. 495.

¹⁹⁴ *Cowdery v. Hahn* (Wis.), 81 N. W. Rep. 882; *Bragg v. Shaw*, 49 Cal. 131; *Gray v. School Dist.*, 35 Neb. 438; *Carson, etc., Asso. v. Miller*, 16 Nev. 327; *Simonson v. Grant*, 36 Minn. 439; *Ryan v. Morton*, 65 Tex. 258; *Evans v. Graden*, 125 Mo. 72; *Board v. Branhan*, 57 Fed. Rep. 179; *Calvert v. Dock Co.*, 2 Keen. 638; *Peters v. Mackay*, 20 Wash. 172.

from an advanced payment they are not discharged; as where the owner of the new building loans the contractor money and takes his due bill, and pays money to him for materials as soon as delivered, and then makes a settlement at the time of the first payment and takes back the due bill.¹⁹⁵

§ 139. TENDER OF PAYMENT.—When the principal at maturity of the debt, tenders the amount due to the creditor, who refuses it, this discharges the surety,¹⁹⁶ and such tender need not be kept good nor paid into court.¹⁹⁷ And so if the surety tenders payment and the creditor refuses it, he is discharged and need not keep the tender good.¹⁹⁸

¹⁹⁵ *Hand Mfg. Co. v. Marks* (Ore.), 59 Pac. Rep. 549. See, also, *Cochran v. Baker* (Oreg.), 56 Pac. Rep. 641.

¹⁹⁶ *Smith v. Loan Asso.*, 119 N. Car. 257.

¹⁹⁷ *Smith v. Loan Asso.*, 119 N. Car. 257; *Mitchell v. Roberts*, 17 Fed. Rep. 776.

¹⁹⁸ *O'Connor v. Bragly*, 112 Cal. 31; *Solomon v. Reese*, 34 Cal. 36; *Hayes v. Josephi*, 26 Cal. 535.

CHAPTER VI.

RIGHTS AND REMEDIES OF SURETY AS TO CREDITOR.

§ 140. THE CONTRACT IN GENERAL.—One who becomes surety for another must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one accruing in the usual course of business of that description, subjecting him only to risks attending it. The principal debtor is presumed to know that such will be his undertaking, and that he will act upon it unless he is informed that there are some extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, well knowing that there are such circumstances, and having a suitable opportunity to make them known and withholding such information, is a legal fraud by which the surety will be relieved from his contract.¹ If the person giving the credit makes use of any artifice to throw the surety off his guard and lull him into a false security, and he is thereby deceived to his detriment, he will be discharged.²

If the creditor knows or has good ground for believing that the surety is being deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing his risk, of which the creditor has knowledge, and he has the opportunity before accepting the undertaking to inform him of such facts, good faith and fair dealing demand that he should make such disclosure, and if the creditor accepts the contract without doing so, the surety may afterwards avoid it.³

¹ *Sooy v. State*, 39 N. J. L. 135; *Franklin Bank v. Cooper*, 36 Me. 179.

² *Roper v. Sangamon Lodge*, 91 Ill. 518; *Railton v. Matthews*, 10 Cl. & F. 934; *Wayne v. Bank*, 52 Pa. St. 250; *Lee v. Jones*, 17 C. B., N. S. 482; *Smith v. Joslyn*, 40 Ohio St. 409; *Taylor v. Lohman*, 74 Ind. 418.

³ *Hamilton v. Watson*, 12 Cl. & F. 109; *Franklin Bank v. Stevens*, 39 Me. 542; *Booth v. Storrs*, 75 Ill. 438; *Ham v. Greve*, 34 Ind. 18; *Bank v. Andrews*, 65 Iowa, 692.

§ 141. DILIGENCE OF SURETY.—If the surety before becoming such applies to the creditor for information relating to the risk about to be assumed, the creditor, if he answers at all, must disclose all the facts which he knows in that regard; and he can do nothing to deceive or mislead the surety without violating the agreement. Whether a creditor is bound to volunteer disclosures to one about to become a surety, depends upon circumstances of the case. If there is nothing in the circumstances to indicate that the surety is being misled or deceived, or is ignorant of facts materially affecting the risk, the creditor is not bound to seek the surety and inform him of the facts. But if he knows, or has good ground to know, that the surety is being deceived, or has entered into the contract in ignorance of such facts, and has an opportunity to disclose them to the surety before accepting the obligation, he must do so, or the surety may afterwards avoid the contract if he has used due diligence.⁴

It is the duty of the surety to look out for himself, and to ascertain the nature of the obligations embraced in the undertaking;⁵ and so the creditor is not bound to inform the surety of the insolvency of the principal.⁶

§ 142. FACTS CONCEALED—NOT CONNECTED WITH THE CONTRACT.—In order that a failure to communicate facts by the creditor to the surety in respect to the subject-matter of the proposed contract should have the effect of fraud upon the surety and vitiate the contract, it must be facts which necessarily have the effect to increase the responsibility or operate to his prejudice.⁷ To vitiate a bond on the ground of fraud by the obligee, there must be a fraudulent concealment or something material for the surety to know.⁸ The law simply requires from the obligee to the surety upon the bond good faith and fair dealing.

⁴ *Pidock v. Bishop*, 3 Barn. & C. 605; *Franklin Bank v. Cooper*, 39 Me. 542; *Stone v. Compton*, 5 Bing. N. C. 142.

⁵ *Casoni v. Jerome*, 58 N. Y. 321.

⁶ *Roper v. Sangamon Lodge*, 91 Ill. 518; *Ham v. Greve*, 34 Ind. 18; *Farmers', etc., Bank v. Braden*, 145 Pa. St. 473.

⁷ *Comstock v. Gage*, 91 Ill. 328; *Bostwick v. Van Voorhis*, 91 N. Y. 353.

⁸ *Atlas Bank v. Brownell*, 9 R. I. 168.

§ 143. FACTS DEVELOPED SUBSEQUENT TO THE CONTRACT.—

In the case of a continuing guaranty for the undertaking of a servant, if the master discovers acts of dishonesty in the servant, and afterwards continues him in his service without notice to the surety, the latter is discharged as to further dishonesty, from the time of discovery.⁹ Because the employer impliedly stipulates that he will not knowingly retain such clerk or agent in his service after a breach of the guaranty justifying his discharge, and if he retains him after such breach, the surety will not thereafter be liable.¹⁰ But it is said that mere passiveness on the part of the creditor in not enforcing his remedy will not of itself discharge the surety; nor will failure or negligence to give notice to the surety of the principal's prior default. The creditor under such circumstances is not bound to anticipate inquiry by disclosure.¹¹

Mere forbearance by the creditor to the principal, however prejudicial to the surety, will not discharge him. The same rule applies to sureties for officers of corporations. It is not the duty of the corporation to give notice to the sureties of the principal's failure to make returns for money received and disbursed.¹²

§ 144. SET-OFF AND RECOUPMENT.—The decisions are conflicting as to whether the surety can set off against the creditor a debt due by the creditor to the principal. In many cases it is held that such can be done. Thus, it is held that whatever defense by way of recoupment will avail the principal will also avail the surety.¹³ The rule is that demands cannot be set off unless they are mutual and between the two parties to the action; that is, that a joint debt cannot be set off against a separate debt, nor a separate debt against a joint debt. But an exception is

⁹ Phillips v. Foxall, L. R. 7 Q. B. 666; Enright v. Falvey, 4 L. R. Ir. 397; Sanderson v. Osten, L. R. 8 Ex. 73.

¹⁰ Rapp v. Ins. Co., 113 Ill. 390; Dinsmore v. Tidhall, 34 Ohio St. 411.

¹¹ Pickering v. Day, 3 Houst. 474, 533; Peel v. Tatlock, 1 Bos. & P. 419.

¹² Orme v. Young, 1 Holt, N. P. 84; Pittsburg, etc., R. R. Co. v. Shaeffer, 59 Pa. St. 350; Watertown Ins. Co. v. Simmons, 131 Mass. 85; Richmond, etc., R. R. Co. v. Kasey, 30 Gratt. 218; Mayor v. Kennett, 12 Lea, 700.

¹³ Waterman v. Clark, 76 Ill. 428; McHardy v. Wadsworth, 8 Mich. 350.

made in an action against the principal and his surety, so a claim of the principal against the creditor may be set off.¹⁴ But other decisions hold that the surety alone cannot set off a claim of the principal against the creditor, because in such case it is the right of the principal to set up a set-off if sued, or bring his separate action, and the surety cannot make the election for the principal or do anything to impair his right of recovery in a separate action.¹⁵

But it is held that insolvency of one of the parties is sufficient ground, in equity, for an allowance of set-off; and though one of the parties seeking the set-off be a surety for the other, equity will adjudge it in favor of both against a demand collectible of both.¹⁶

If the principal debtor be a party to the action against a surety, and the former is insolvent, the surety may set off against the debt sued on, a debt due from his creditor to the principal debtor. And if the action be against the surety alone, the principal may intervene for the purpose of defeating the recovery by the creditor, and for that purpose may set off a debt due him from the creditor.¹⁷ And the principal who is insolvent cannot collect a debt which the surety owes him without indemnifying the surety. He may use his liability to the principal as an equitable set-off against his debt to the principal.¹⁸

§ 145. COMPELLING CREDITOR TO BRING SUIT.—The creditor is under an equitable obligation to obtain payment from the principal if he is able to pay the debt. And equity will inter-

¹⁴ *Concord v. Pillsbury*, 33 N. H. 310; *Hayes v. Cooper*, 14 Ill. App. 490; *Himrod v. Baugh*, 85 Ill. 435; *Cole v. Justice*, 8 Ala. 793; *Hollister v. Davis*, 54 Pa. St. 508; *Downer v. Dana*, 17 Vt. 518; *Loring v. Morrison*, 15 App. D. 498; *Van Etten v. Aoster*, 48 Neb. 152; *Bechervaise v. Lewis*, L. R. 7 C. P. 372.

¹⁵ *Gillespie v. Torrance*, 25 N. Y. 306; *State v. George*, 150 Mo. 1; *Phoenix Iron Works v. Rhea*, 98 Tenn. 461; *Graff v. Kahn*, 18 Ill. App. 485.

¹⁶ *Smith v. Felton*, 43 N. Y. 419; *Coffin v. McLean*, 80 N. Y. 560.

¹⁷ *Becker v. Northway*, 44 Minn. 61.

¹⁸ *Walker v. Dicks*, 80 N. Car. 263; *Scott v. Timberlake*, 83 N. Car. 382; *Merwin v. Austin*, 58 Conn. 22; *Fearle v. Dillard*, 5 Leigh (Va.), 30; *Tuscumbia v. Rhodes*, 8 Ala. 206.

pose for a good cause shown to compel the creditor to sue the principal before resorting to the surety.¹⁹ But this action on the part of the surety is limited ordinarily to cases where his character as surety stands upon the face of the instrument itself; and also where he agrees to indemnify the principal, and also offers to pay whatever the principal may fail to pay under such procedure.²⁰ So, where the statute does not control, and the debt has become payable, the surety may file a bill in equity to compel the creditor to proceed against the principal for payment of the debt, and thereby relieve himself against liability.²⁴

In some States it is provided by statute that by service of written notice upon the creditor the surety can compel him to sue the principal, and if the creditor fails to comply with the notice, the surety is discharged.²² But the surety cannot relieve himself from liability by requiring the creditor to sue the principal only where the cause of action has accrued against the principal.²³ And such statute is only applicable to contracts in writing, binding the surety, and not to contracts of suretyship arising from implication.²⁴ And the notice to sue must be delivered to the creditor in person, and not to his agent.²⁵ And where there are two or more sureties a notice under the statute to sue given by one surety in his own behalf will not operate to discharge another surety who does not join him in the notice.²⁶

§ 146. EFFECT OF NOTICE BY SURETY TO CREDITOR TO PROCEED TO COLLECT DEBT.—It is provided in many States that

¹⁹ Huey v. Pinney, 5 Minn. 310; King v. Baldwin, 17 Johns. 384; Wise v. Shepherd, 13 Ill. 41.

²⁰ In re Babcock, 1 Story, 398.

²¹ Irick v. Black, 17 N. J. Eq. 189; Hurley v. Furey, 54 N. J. Eq. 177; King v. Baldwin, 17 Johns. 384.

²² Barnes v. Sammons, 128 Ind. 596.

²³ Imming v. Fiedler, 8 Ill. App. 256.

²⁴ Fish v. Glover, 154 Ill. 86.

²⁵ Bartlett v. Cunningham, 85 Ill. 22.

²⁶ Wilson v. Tebbetts, 29 Ark. 579; Letcher v. Yantes, 3 Dana, 160; Routan v. Lacey, 17 Mo. 399; Klingensmith v. Klingensmith, 31 Pa. St. 460; Barrow v. Shields, 13 La. Ann. 57; Alford v. Baxter, 36 Vt. 158; Trustees v. Southard, 31 Ill. App. 359.

a written notice from the surety to the creditor, after the debt is due, to proceed forthwith against the principal, will discharge the surety if the creditor fails to heed and act upon such notice.²⁷ And in some States such notice is not required by statute, but the effect is the same.²⁸

The notice, in order to discharge the surety, must be clear and explicit, so that the creditor can fully understand its meaning. The notice must be positive that he will consider himself discharged unless the suit is brought,²⁹ and collection to be made by due process of law.³⁰

If the principal is a non-resident at the time the notice is given, such notice does not discharge the surety.³¹ If the creditor is ignorant of the residence of the principal upon receiving notice to sue from the surety, it is his duty to use reasonable diligence to ascertain such residence.³² In some States, notice given to the creditor will not release the surety, though the principal afterwards becomes insolvent. The surety's remedy is to pay the debt himself and then sue the principal.³³

§ 147. CREDITOR'S PROMISE TO LOOK TO THE PRINCIPAL ONLY.—A parol promise of the creditor to the surety, after the debt is due that he will exonerate the surety and look to the principal only, will discharge the surety,³⁴ on the ground that

²⁷ *Clark v. Osborn*, 41 Ohio St. 28; *Hightower v. Ogletree*, 114 Ala. 94; *Barnes v. Sammons*, 128 Ind. 596; *Imming v. Fiedler*, 8 Ill. App. 256; *Langdon v. Markle*, 48 Mo. 357; *Graham v. Resle*, 73 Iowa, 451; *Ross v. Jones*, 22 Wall. 576.

²⁸ *Rawson v. Beekman*, 25 N. Y. 552; *Denick v. Hubbard*, 27 Hun, 347; *McCollum v. Hinckley*, 9 Vt. 143; *Wetzel v. Sponsler*, 18 Pa. St. 460; *Thompson v. Watson*, 10 Yerg. 362; *Fidler v. Hershy*, 90 Pa. St. 363.

²⁹ *Fidler v. Hershy*, 90 Pa. St. 363; *Savage v. Carleton*, 33 Ala. 443; *Bates v. Bank*, 7 Ark. 394; *Porter v. Bank*, 54 Ohio St. 155.

³⁰ *Goodwin v. Simonson*, 74 N. Y. 133; *Kaufman v. Wilson*, 29 Ind. 504.

³¹ *Phillips v. Riley*, 27 Mo. 386; *Rowe v. Buchtel*, 13 Ind. 38; *Conklin v. Conklin*, 54 Ind. 289; *Hightower v. Ogletree*, 114 Ala. 94.

³² *Cox v. Jeffries*, 73 Mo. App. 412.

³³ *Smith v. Freyler*, 4 Mont. 489; *Hefferlin v. Kieger*, 19 Mont. 125; *Pintard v. Davis*, 21 N. J. L. 632.

³⁴ *Harris v. Brooks*, 21 Pick. 195.

the surety, by reason thereof, omits to pay the debt and fails to secure himself, or he may change his position.³⁵ If at any time the creditor makes an absolute promise to look to the principal alone for the payment, and the surety, in reliance on that promise, surrenders securities held for indemnity, or is induced to omit to procure security, or otherwise changes his position with reference to the principal, he is thereby discharged.³⁶

But the creditor's mere statement to the surety that the debtor's responsibility was sufficient security for the debt, and that the surety was not to be called upon, will not estop the creditor from resorting to the surety, if the claim was not renounced and the surety was not misled to his disadvantage.³⁷ Because such declarations are made to be received as expressions of opinion. They neither invite confidence, nor is confidence ever reposed in them. Standing alone they will not discharge the surety.³⁸

But when the surety is released by such express promise, the principal still remains liable for the whole debt.³⁹ The liability of the principal is not changed by release of the surety. Thus, a surety on a promissory note may buy his discharge and leave in full force the original debt against the principal.⁴⁰

§ 148. CREDITOR INFORMING THE SURETY THAT THE DEBT IS PAID.—When the creditor gives notice to the surety that the principal has paid the debt, and such surety in consequence changes his situation, as by surrendering securities or forbearing to obtain security when he might, or otherwise has sustained loss, he is discharged, though the debt was not paid, and such notice was by mistake and without fraudulent design. It is a mistake

³⁵ *West v. Brison*, 99 Mo. 694; *Thornburg v. Madren*, 33 Iowa, 380; *Wolf v. Madden*, 82 Iowa, 114.

³⁶ *Bank v. Haskell*, 51 N. H. 116; *Whitaker v. Kirby*, 54 Ga. 277.

³⁷ *Mich. State Ins. Co. v. Soule*, 51 Mich. 312; *Adams v. Gregg*, 2 Starkie, 53.

³⁸ *Brubaker v. Okeson*, 36 Pa. St. 519; *Driskell v. Mateer*, 31 Mo. 235; *Barney v. Clark*, 46 N. H. 514.

³⁹ *Mortland v. Hines*, 8 Pa. St. 265.

⁴⁰ *McIlhenney v. Blum*, 68 Tex. 197.

made at the peril of the creditor,⁴¹ and works on the principle of estoppel.

§ 149. SURETY MAY COMPEL CREDITOR TO RESORT TO SECURITIES IN THE CREDITOR'S HANDS.—At law a surety will be compelled to pay the debt, and after that look to the collaterals of his principal for indemnity; but in equity, if there be circumstances from which it appears directly or by reasonable inference that substantial injury or prejudice will not result to the creditor by the enforcement, in the first instance, of the surety's right, and have the debt paid from the principal's property, the surety may in case of hardship compel the creditor to resort to the securities in the creditor's hands or under his control, the property of the principal, in satisfaction of the debt before coming upon him,⁴² or compel the creditor to make the debt from the principal who is financially able to pay.⁴³

§ 150. RIGHT OF SURETY TO DEFEND ACTION BROUGHT AGAINST HIS PRINCIPAL.—Sureties are allowed, when it is necessary for their own protection, to defend an action brought against their principal. So if a judgment against the principal is irregularly obtained, the sureties will be heard, if they apply in time, on motion to set it aside, and let in to defend the original action.⁴⁴ So a guarantor or surety may go into court after suit is begun against the principal and demand reasonable protection. And if the creditor destroys their claim against the principal with a view of falling back upon them, they will be discharged.⁴⁵

§ 151. SUBROGATION OF CREDITOR TO SURETY'S SECURITIES.—When the debtor has given security to his surety for the

⁴¹ *Baker v. Briggs*, 8 Pick. 122; *Dewey v. Field*, 4 Met. 381; *Carpenter v. King*, 9 Met. 511; *Whitaker v. Kirby*, 54 Ga. 277; *Brooking v. Bank*, 83 Ky. 431; *Waters v. Creagh*, 4 Stew. & P. (Ala.) 410.

⁴² *Hurley v. Furey*, 54 N. J. Eq. 177; *Phila. etc. R. R. Co. v. Little*, 41 N. J. Eq. 519.

⁴³ *Dobie v. Casualty Co.*, 95 Wis. 540; *Beaver v. Beaver*, 23 Pa. St. 167.

⁴⁴ *Jewett v. Whitman*, 35 Barb. 208.

⁴⁵ *Stark v. Fuller*, 42 Pa. St. 320.

indemnity of the latter only, the creditor is entitled to the benefit of the same by proceedings commenced in equity after the debt is due, before the surety has, in good faith, surrendered or discharged such security.⁴⁶ The right of the creditor is derived through, and not independent of, the surety, and the creditor seeking to enforce his claim against the surety is, in equity, entitled to subject to the payment of his debt the security then subsisting for the personal indemnity of the surety to the same extent that the surety would have, had he discharged the debt. There is no element of trust in such security in favor of the creditor until he has taken proper steps to subject it to the payment of his claim. And until the creditor has taken such steps the surety has a right to release such security.⁴⁷ Whether a creditor can avail himself of the security given to the surety by the debtor, depends upon the purpose for which it is given. If the security be purely personal to indemnify the surety, the creditor cannot have the benefit of such surety until the surety is actually damnified, or, at least, has become absolutely liable for the debt, for the creditor must claim through the surety by subrogation, and until then the surety has no remedy upon the security.⁴⁸ If the security is given for the better security of the debt itself, as for its payment by the principal debtor, or to provide the surety with means to pay the debt in case of default, then, although the purpose is to indemnify the surety to the same extent, a trust attaches to the security for the benefit of the creditor, to which the court will give effect.⁴⁹ Thus, where a mortgage is given by a debtor to his surety for a better security of

⁴⁶ *Wright v. Morley*, 11 Ves. 22; *Phillips v. Thompson*, 2 Johns. Ch. 418; *Rankin v. Wilson*, 17 Iowa, 463; *Jones v. Bank*, 29 Conn. 25; *South Omaha Nat. Bank v. Wright*, 45 Neb. 23; *Haven v. Foley*, 18 Mo. 136; *Eastman v. Foster*, 8 Met. 19; *Russell v. Clark*, 7 Cranch, 69; *Meyers v. Campbell*, 59 N. J. L. 378.

⁴⁷ *Poole v. Lowe*, 24 Colo. 475.

⁴⁸ *Ohio Life Ins. Co. v. Reeder*, 18 Ohio St. 46; *Chambers v. Prewitt*, 172 Ill. 615.

⁴⁹ *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Pavis v. Hulett*, 26 Vt. 308; *Homes v. Bank*, 7 Conn. 484; *Eastman v. Foster*, 8 Met. 19; *Aldrich v. Blake*, 134 Mass. 584; *Plant v. Storey*, 136 Ind. 46; *Chambers v. Prewitt*, 172 Ill. 615.

his debt, or to provide the surety with means to pay it, in case of the debtor's default, then, although the purpose is to indemnify the surety, a trust attaches to the mortgage for the benefit of the creditor which the courts will enforce.⁵⁰

In some States it is held in order to make such security available to the creditor in any case, it must be conditioned for the payment of the debt, to be enforced on default in its payment.⁵¹

When the security is given by a stranger to indemnify the surety, and not for the payment of the debt, a trust does not attach to it for the creditor, and he cannot be subrogated to the rights of the surety;⁵² nor is the rule changed because the security was given by the wife of the principal, for she is a stranger to the debt.⁵³

If the creditor is secured also by a mortgage on the surety's property, the other creditors of the surety cannot compel the secured creditor first to exhaust the remedies against the principal, before resorting to the mortgaged premises of the surety.⁵⁴

§ 152. SUBROGATION OF SURETY TO CREDITOR'S RIGHTS.—The surety may be subrogated to the rights of the creditor under certain circumstances. If the surety has paid the debt of the principal, he may be subrogated to all the securities, liens, equities, rights, remedies and priorities held by the creditor against the principal, and he is entitled to enforce them against the latter in a court of equity, or of equitable jurisdiction.⁵⁵ But

⁵⁰ *Chambers v. Prewitt*, 172 Ill. 615.

⁵¹ *Poole v. Doster*, 59 Miss. 258; *Clay v. Freeman*, 74 Miss. 816.

⁵² *Taylor v. Bank*, 87 Ky. 398; *Leggett v. McClelland*, 39 Ohio St. 624; *Hampton v. Phipps*, 108 U. S. 260.

⁵³ *Taylor v. Bank*, 87 Ky. 398; *Leggett v. McClelland*, 39 Ohio St. 624.

⁵⁴ *Webber v. Webber*, 109 Mich. 147.

⁵⁵ *Rorer v. Ferguson*, 96 Va. 411; *Meyers v. Miller* (W. Va.), 31 S. E. Rep. 976; *Sternbach v. Criedman*, 34 App. D. 534; *Whitbeck v. Ramsey*, 74 Ill. App. 524; *Keokuk v. Love*, 31 Iowa, 119; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Hackett v. Watts*, 138 Mo. 502; *Storts v. George*, 150 Mo. 1; *Gilbert v. Adams*, 99 Iowa, 519; *Bartholomew v. Bank*, 57 Kan. 594; *Wilson v. Buney*, 8 Neb. 39; *Rice v. Southgate*, 16 Gray, 142; *Dorsheimer v. Bucher*, 7 S. & R. 9; *Dick v. Moon*, 26 Minn. 309; *Wilson v. Phillips*, 27 Tex. 543; *Willingham v. Trust Co.* (Ky.), 56 S. W. Rep. 706; *Frank v. Taylor*, 130 Ind. 145.

the surety cannot ordinarily claim the right to subrogation until he has paid the whole debt.⁵⁶ And this right of subrogation arises out of the contract of suretyship, and is consummated when the surety pays the entire debt.⁵⁷

The surety is entitled to all the securities if necessary to pay the debt, and any person with notice who takes such securities is bound in equity to hold them for the indemnity of the surety, and is subject to all equities which the surety could originally enforce;⁵⁸ but, of course, the surety must first pay the debt, and then he can enforce the securities held by the creditor;⁵⁹ and the surety has a right to exact of the creditor proper care and diligence in the management and collection of such collaterals, and any waste or misapplication of them will operate as a release of the surety to the amount of loss actually sustained.⁶⁰

§ 153. WHAT SECURITIES THE SURETY IS ENTITLED TO CLAIM.—The general rule is that, in equity, a surety is entitled to the benefit of securities which the creditor holds against the principal, pertaining to the identical debt.⁶¹ Thus, where a party is a surety for a partnership and for one of the partners individually, he has no right to apply the funds or securities received for the partnership to the payment of the debts of the individual.⁶² The debt and the parties must be identical, and the securities be those pledged for the debt by the principal debtor; then on payment of the debt, the surety can be subrogated to the rights of the creditor.⁶³

§ 154. WHEN SURETY CAN TAKE SECURITIES.—The surety

⁵⁶ *Bartholomew v. Bank*, 57 Kan. 594.

⁵⁷ *Wayland v. Tucker*, 4 Gratt. 268.

⁵⁸ *Atwood v. Vincent*, 17 Conn. 575; *Drew v. Lockett*, 32 Beav. 499; *Stevens v. Cooper*, 1 Johns. Ch. 430; *Lichenthaler v. Thompson*, 13 Serg. & R. 157.

⁵⁹ *Brick v. Banking Co.*, 37 N. J. L. 307.

⁶⁰ *Rogers v. Trustees*, 46 Ill. 428.

⁶¹ *Copis v. Middleton*, 1 Turn. & Russ. 224; *Hodgson v. Shaw*, 3 Myl. & K. 183.

⁶² *Downing v. Linville*, 3 Bush, 472; *Stafford v. Bank*, 132 Mass. 315.

⁶³ *Hodgson v. Shaw*, 3 Myl. & K. 183.

is a creditor from the time he becomes surety; and when he pays the debt a cause of action for reimbursement arises for substitution to the securities held by the principal creditor. His right becomes immediately consummate to have the securities applied to his payment.⁶⁴ Thus, where a surety pays a note due secured by a chattel mortgage, he then has a right to subrogation to the creditor's rights and take possession of the property for his security, in the same manner as the creditor would have if the note had not been paid.⁶⁵ And so, if he pays a note secured by mortgage upon land, he is in equity subrogated to the mortgage security held by the mortgagee,⁶⁶ and if the mortgagee releases the mortgage it does not divest his rights except as to third parties without notice and for a valuable consideration.⁶⁷ When security is given, it may be held until the whole debt is paid if there is nothing in the contract to the contrary.⁶⁸

§ 155. STRANGER PAYING DEBT.—The right to subrogation applies only to sureties or those who have to pay the debt to protect their own interests. Therefore, a mere stranger, or volunteer, cannot pay the debt for which another is bound, and be subrogated to the creditor's rights in respect to the security given by the debtor.⁶⁹ However, if the person so paying is compelled to pay for the protection of his own interest, then he may be subrogated to the rights of the creditor.⁷⁰

§ 156. WHEN SURETY WILL NOT BE SUBROGATED.—The right of subrogation is purely an equitable one, and its application must depend upon circumstances. And whether its application shall be so great as to include all the rights of the creditor must often depend on whether it is necessary to the protection

⁶⁴ Longbridge v. Bowland, 52 Miss. 546.

⁶⁵ Myers v. Yapple, 6 Mich. 339; Torp v. Gulseth, 37 Minn. 135.

⁶⁶ City Nat. Bank v. Dudgeon, 65 Ill. 10; Beaver v. Slanker, 94 Ill. 175; Woods v. Bank, 83 Pa. St. 57; Chrisman v. Harman, 29 Gratt. 494.

⁶⁷ City Nat. Bank v. Dudgeon, 65 Ill. 10.

⁶⁸ Sleingrehe v. Beveling Co., 83 Ill. App. 587.

⁶⁹ Bartholomew v. Bank, 57 Kan. 594; Matley v. Harris, 1 Lea. 577.

⁷⁰ Hough v. Ins. Co., 57 Ill. 318; Young v. Morgan, 89 Ill. 199.

of the surety to apply it.⁷¹ Because equity will not do that which will be of no benefit to the party asking it and only a hardship upon the party coerced.⁷² And it is never applied where it will operate as an injustice to the creditor.⁷³

§ 157. SURETY MUST FIRST PAY THE DEBT.—Ordinarily the creditor is entitled to full satisfaction of the debt before the right of subrogation may be invoked by the surety; so the surety may not interfere with any of the creditor's rights and securities so long as any part of the debt remains unpaid.⁷⁴

The application of the doctrine of subrogation requires that the surety must have paid the debt to the creditor, for the payment of which the principal was, in equity, primarily liable, and that in paying the debt the person so paying acted under compulsion of saving himself from loss, and not as a mere volunteer.⁷⁵ Still, after the debt has become due, the surety may go into equity, without first making payment, and compel the principal to pay it, if he is financially able.⁷⁶

In some cases, in order to avoid circuitry of action or multiplicity of suits, equity will make subrogation of the surety before judgment is rendered against him or payment made. Thus, equity will substitute a surety on a guardian's bond to the rights of the wards, to subject their homestead to the payment of a debt due by the guardian to the wards, before requiring the surety to make good the guardian's default, where the wards are entitled to the homestead.⁷⁷ And so a surety may set aside a fraudulent

⁷¹ *In re Hewitt*, 25 N. J. Eq. 210.

⁷² *Joliet, etc., R. R. Co. v. Healy*, 94 Ill. 416.

⁷³ *Bartholomew v. Bank*, 57 Kan. 594.

⁷⁴ *Bartholomew v. Bank*, 57 Kan. 594; *Willingham v. Trust Co. (Ky.)*, 56 S. W. Rep. 706; *Vert v. Voss*, 74 Ind. 566; *Opp v. Ward*, 125 Ind. 241; *Brough's Estate*, 71 Pa. St. 460; *Conwell v. McCowan*, 53 Ill. 363.

⁷⁵ *Aetna L. Ins. Co. v. Middleport*, 124 U. S. 534; *Hoover v. Epler*, 52 Pa. St. 522; *In re Church*, 16 R. I. 231.

⁷⁶ *Hale v. Wetmore*, 4 Ohio St. 600; *Keokuk v. Love*, 31 Iowa, 199; *Moore v. Topliff*, 107 Ill. 241.

⁷⁷ *State v. Atkins*, 53 Ark. 303; *Gilbert v. Neely*, 35 Ark. 24; *Lusk v. Hopper*, 3 Bush, 179.

conveyance, executed by the principal, after becoming liable for the principal's debt, but before payment of it.⁷⁸ And when the creditor permits the surety to be subrogated to his rights before the debt is paid, the principal debtor or other creditors cannot complain.⁷⁹

§ 158. WHAT IS PAYMENT.—A tender of payment of the debt by the surety differs in no way from tender in any other payment, and must, therefore, be unconditional, where a statute does not control.⁸⁰ So a tender of payment to a creditor by the surety with condition that the security must be assigned to him, is not sufficient to entitle the surety to subrogation.⁸¹ And payment is fully made when the surety pays part and the principal the balance. In such case subrogation will accrue *pro tanto* to the extent of the surety's payment.⁸² And the same would be the effect if two or more sureties contribute in equal or unequal amounts to the complete payment; each would be subrogated according to the amount contributed.⁸³

And payment by one who stands in the relation of surety, although it may extinguish the remedy or discharge the security as respects the creditor, has not that effect as between the principal and the surety.⁸⁴

§ 159. DEBTOR AND CREDITOR.—In equity the surety is regarded as creditor of the principal debtor, and in case of insolvency of the latter, the former may retain any securities in his hands belonging to the principal, and his possession will be sufficient notice to a purchaser of the securities.⁸⁵ And securi-

⁷⁸ Longbridge v. Bowland, 52 Miss. 546.

⁷⁹ Matley v. Harris, 1 Lea, 577.

⁸⁰ Sanford v. Balkley, 30 Conn. 344; Richardson v. Chemical Laboratory, 9 Met. 42.

⁸¹ Forest's Oil Co.'s Appeal, 118 Pa. St. 138.

⁸² Magee v. Leggett, 48 Miss. 139. Compare Allison v. Sutherlin, 50 Mo. 274, where the debt was only partly paid by the surety and he was allowed to be subrogated *pro tanto*, which is against the weight of authority.

⁸³ Bank v. Potaces, 10 Watts, 152.

⁸⁴ Gerber v. Sharp, 72 Ind. 553.

⁸⁵ Crafts v. Mott, 5 Barb. 305.

ties taken by one of two or more sureties inures to the benefit of all.⁸⁶ And the surety before he suffers loss may use his liability as such, as an equitable counterclaim or set-off against a debt he owes his insolvent principal, and this as well against the assignee of an overdue debt as against the assignee himself.⁸⁷

§ 160. FRAUDULENT CONVEYANCES OF PRINCIPAL.—A surety who is compelled to pay the principal's debt, has the right to impeach a deed as fraudulent which was given by the principal during the suretyship.⁸⁸ The surety's contingent liability before he pays the debt is as fully protected against a voluntary conveyance as a claim which is certain and absolute as where he has paid the debt. The rights of the surety or other contingent promisor are regarded for many purposes as commensurate in point of time with the date of the suretyship, and not when the surety actually paid the security debt for the principal. The claim of the surety is considered as having existed, so far as to constitute him a creditor, at the time he incurred the contingent liability. His subsequent payment of the debt extends back by relation to that date, although no demand or right of action technically accrues until a subsequent date.⁸⁹

So whenever payment is made by the surety, he is to be considered as a creditor of his principal from the time the debt was created or note was made and delivered.⁹⁰ And though the surety has no cause of action at law until he has paid the debt, he is entitled to protection against fraudulent conveyances executed by the principal since he become surety.⁹¹

§ 161. AS TO EXEMPTIONS OF PRINCIPAL.—Parties entering into contracts are presumed to have in view such exemption laws and rights as are in force at the date of the contract; in other

⁸⁶ *Elwood v. Deifendorf*, 5 Barb. 398.

⁸⁷ *Walker v. Dicks*, 80 N. Car. 263.

⁸⁸ *Hatfield v. Merod*, 82 Ill. 113.

⁸⁹ *Seward v. Jackson*, 8 Cow. 406; *Gannard v. Eslava*, 20 Ala. 732.

⁹⁰ *Sargent v. Salmond*, 27 Me. 539.

⁹¹ *Bragg v. Patterson*, 85 Ala. 233; *Choteau v. Jones*, 11 Ill. 500; *Keel v. Larkin*, 72 Ala. 493; *Longbridge v. Bowland*, 52 Miss. 546.

words, the laws in force enter into and become a part of the contract.⁹² As against a surety who has to pay the debt of the principal, the right of the principal to homestead and other exemptions, as to their full extent, are to be determined by the law which was in force when the contract of suretyship was made, and not by the law in force when the debt was actually paid.⁹³ But if a new liability is created by reason of a change of parties or otherwise, and it is taken in full payment and discharge of the original debt, the right of exemption is measured by the law in force at the date of the new obligation.⁹⁴

§ 162. WHEN SURETY OWES PRINCIPAL.—As already stated, the surety becomes a creditor of the principal from the date of his suretyship.⁹⁵ So a surety has an equitable interest in his own debt to his principal, arising from the implied contract of the principal to see him indemnified; and this equity will prevail over any counter equity of a subsequent date. Thus, where the surety has paid the debt of his principal subsequent to an assignment, the assignee cannot collect the debt owed by the surety to the principal, because the surety's payment related back to the contract of suretyship, and therefore took precedence, which can be set off against the surety debt paid.⁹⁶

If the surety takes property from his principal and agrees that it shall satisfy his liability as surety, the surety is bound, and cannot collect further from his principal, after paying the debt.⁹⁷ On the other hand, when it appears to the court that the surety has paid and discharged his liability, and the amount so paid by him is equal to or greater than the judgment against him, the court will offset the amount so paid by the surety against the judgment.⁹⁸

⁹² *Gunn v. Barry*, 15 Wall. 610.

⁹³ *Keel v. Larkin*, 76 Ala. 493.

⁹⁴ *Keel v. Larkin*, 76 Ala. 493.

⁹⁵ *Beach v. Doynton*, 26 Vt. 725.

⁹⁶ *Barney v. Grover*, 28 Vt. 391.

⁹⁷ *Lewis v. Lewis*, 92 Ill. 237.

⁹⁸ *Mattingly v. Sutton*, 19 W. Va. 19.

§ 163. PAYMENT OF A SPECIALTY OR JUDGMENT.—The payment of a bond or other specialty, or judgment, by a surety is not generally extinguished, but is preserved by a court of equity, but not of law, for the surety's benefit.⁹⁹ This, however, is a question often controlled by statute.

In Illinois the surety may keep the judgment alive which he has paid for his benefit by procuring it to be formally assigned to a third person, or he may treat the judgment as satisfied and resort to his action against the principal. And if the judgment be assigned, the surety may still treat it as discharged and resort to his action against the principal.¹⁰⁰

In Iowa the surety is entitled to an assignment of the judgment to himself, or to another for his benefit, and equity will regard the lien as still subsisting, and will aid the surety in its enforcement.¹⁰¹ In Minnesota he may take an assignment of the judgment and enforce the same against the principal,¹⁰² and this is the law of Missouri,¹⁰³ and in New York.¹⁰⁴ In Ohio the surety may be substituted to the rights of the creditor against the principal.¹⁰⁵ Equitable rules will keep the judgment alive for the benefit of the surety.¹⁰⁶ It is the general rule that the payment of a judgment rendered against the surety and principal, or against the insolvent principal alone, by the surety, will subrogate the surety to the benefits of the judgment, which he may enforce against the principal.¹⁰⁷ Still there are several

⁹⁹ *Knight v. Morrison*, 79 Ga. 55.

¹⁰⁰ *Katz v. Maessinger*, 110 Ill. 372. See Hurd's Ill. Stat. (1895) ch. 98, sec. 7c.

¹⁰¹ *Bones v. Aiken*, 35 Iowa, 534.

¹⁰² *Kimmel v. Lowe*, 28 Minn. 265.

¹⁰³ *Burne v. Schnecko*, 100 Mo. 250.

¹⁰⁴ *Eno v. Crooke*, 10 N. Y. 60.

¹⁰⁵ *Peters v. McWilliams*, 6 Ohio St. 155.

¹⁰⁶ *Brown v. Beach*, 96 Pa. St. 482.

¹⁰⁷ *Newton v. Field*, 16 Ark. 216; *Dodd v. Wilson*, 4 Del. Ch. 399; *Gerber v. Sharp*, 72 Ind. 553; *Harris v. Frank*, 29 Kan. 200; *Schoolfeld v. Rudd*, 9 B. Mon. 291; *Connely v. Bong*, 16 La. Ann. 108; *Crisfield v. State*, 55 Md. 192; *Smith v. Rumsey*, 33 Mich. 183; *Sweeney v. Lustfield*, 116 Mich. 696; *Dinkins v. Bailey*, 23 Miss. 665; *Eaton v. Lambert*, 1 Neb. 339; *Low v. Blodgett*, 21 N. H. 121; *Durand v. Truesdell*, 44 N. J. L. 597; *Hanner v. Douglass*, 4 Jones Eq. (N. Car.) 263; *Garvin v. Garvin*, 27 S. Car. 472;

courts that hold that by payment of the judgment by the surety against himself or against him and his principal, he thereby extinguishes the judgment and cannot have it reviewed, even in equity.¹⁰⁸

§ 164. EXTENT OF SUBROGATION.—The surety is not entitled to recover from his principal a greater amount than he has paid for him, but he is entitled to interest on that amount from the date of payment, and necessary costs. So if the surety pays the debt in depreciated currency, he can demand from his principal only the value of the currency or other medium at the time of payment, and the criterion of value is the market value.¹⁰⁹ Nor will the surety be allowed to speculate in the obligations of his principal.¹¹⁰ And so where a surety on a bond has settled the same, he cannot claim from the principal more than he has paid in satisfaction.¹¹¹

If the sureties pay the creditor in his own obligations instead of money, either before or after judgment, this payment entitles them to the same indemnity as if paid in money after judgment. So where the creditor sues the sureties and they are allowed a set-off to part of his demand, their right of subrogation is not limited to the amount of the judgment against them for the balance, but extends to the whole amount of the creditor's claim.¹¹² Because the equities of the sureties to subrogation extend not only to the rights of the creditor against the principal, but to all rights of the creditor respecting the debt which the sureties pay.¹¹³

McNairy v. Eastland, 10 Yerg. 310; *Tutt v. Thornton*, 57 Tex. 35; *Coffman v. Hopkins*, 75 Va. 645; *German Sav. Bank v. Fritz*, 68 Wis. 390; *Bragg v. Patterson*, 85 Ala. 233.

¹⁰⁸ *Whittier v. Hemingway*, 22 Me. 238; *Pray v. Maine*, 7 Cush. 253; *Frevert v. Henry*, 14 Nev. 181; *Moore v. Campbell*, 36 Vt. 361.

¹⁰⁹ *Butler v. Butler*, 8 W. Va. 674; *Hall v. Cresswell*, 12 Gill & J. 36; *Kenedrick v. Forney*, 22 Gratt. 748.

¹¹⁰ *Schoonover v. Allen*, 40 Ark. 132.

¹¹¹ *Martindale v. Brock*, 41 Mr. 571; *Black v. Bank*, 149 Mass. 250.

¹¹² *Keokuk v. Love*, 31 Iowa, 119.

¹¹³ *Braugh v. Griffith*, 16 Iowa, 26.

§ 165. SURETY OF A SURETY.—A surety of a surety who has paid the obligation, has the same equity of subrogation as the surety to whom he was bound.¹¹⁴ So if a creditor exacts the whole of his demand from one of the sureties, that surety is entitled to be substituted in his place and to a cession of his rights and securities.¹¹⁵ But a surety of a surety being compelled to pay the creditor is not entitled to be subrogated in the place of such creditor for the purpose of enforcing the payment against the principal debtor, if such debtor has paid his immediate surety.¹¹⁶

It is entirely competent for one person to become surety for other sureties, or to limit the extent of his liability with respect to the other sureties. The true test of liability in these cases is the intent of the parties as indicated by their mutual agreement.¹¹⁷ And a surety for a surety is not bound with the first; that is, the last surety is not bound with the one whose name precedes his as surety of the principal, and he becomes liable only after the first.¹¹⁸ The last surety may sign as surety for those preceding him, and not for the principal, and then he will be held liable after his principal fails.¹¹⁹ Thus, where he signs a note as security for one who is himself a surety for the principal maker, he is not liable in a suit for contribution by the one for whom he signed as security.¹²⁰

§ 166. CO-SURETIES.—A surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against his co-surety in the same manner as against the

¹¹⁴ *Rittenhouse v. Levering*, 6 Watts & S. 190.

¹¹⁵ *Cheesebrough v. Millard*, 1 Johns. Ch. 409; *King v. Baldwin*, 2 Johns. Ch. 554.

¹¹⁶ *New York State Bank v. Fletcher*, 5 Wend. 85.

¹¹⁷ *McNeilly v. Patchin*, 23 Mo. 40; *McCollum v. Boughton*, 132 Mo. 601.

¹¹⁸ *Harris v. Warner*, 13 Wend. 400; *Sayles v. Sims*, 73 N. Y. 551; *Craythorne v. Swinburne*, 14 Ves. 16; *Moffit v. Roche*, 77 Ind. 48; *Sherman v. Beach*, 49 Vt. 198.

¹¹⁹ *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; *Robertson v. Deatharge*, 82 Ill. 511; *McCollum v. Boughton*, 132 Mo. 601.

¹²⁰ *Robertson v. Deatharge*, 82 Ill. 511.

principal.¹²¹ So where there are two sureties on bills of exchange and specialties, and one of them has paid more than his proportion, and contribution is sought, the surety who has overpaid will be subrogated to the right of his creditor to that extent, because the principle of substitution applies equally to cases arising between co-sureties and those between surety and principal.¹²² But co-sureties will be entitled to the benefits of any compromise effected by the paying surety, or any discounts that have been obtained by paying the debt in depreciated currency, notes of banks or any other reduction.¹²³ And so, on the other hand, a co-surety must contribute for costs of a suit beneficial to his interest.¹²⁴

§ 167. JOINT DEBTORS.—A joint debtor who has been compelled to pay more than his share of the indebtedness, becomes a surety for his co-debtor, and will be subrogated to the rights of the creditor against his co-debtor for his ratable share of the debt.¹²⁵ But if the debt is compromised or paid in depreciated currency, the actual amount paid will be the criterion of settlement and subrogation. If a co-promisor pays a debt barred by the statute of limitations against the consent of his co-debtor, he has no right of subrogation as against the non-consenting promisor.¹²⁶

§ 168. SUCCESSIVE SURETIES IN JUDICIAL PROCEEDINGS.—Where one is surety for a debtor and the creditor brings suit against the principal, who appeals the case after judgment is rendered against him, and gives an appeal bond with surety, then the original surety for the principal debtor, upon paying

¹²¹ Hess's Estate, 69 Pa. St. 272.

¹²² Lidderdole v. Robinson, 2 Brock. 160; 12 Wheat. 594; Croft v. Moore, 9 Watts, 451.

¹²³ Edwards v. Sheahaw, 47 Tex. 443; Kelly v. Page, 7 Gray, 213; Jones v. Bradford, 25 Ind. 305. See sec. 194 *et seq.*

¹²⁴ Connolly v. Dolan (R. I.), 46 At. Rep. 36.

¹²⁵ Ackerman's Appeal, 106 Pa. St. 1; Schoenewald v. Dieden, 8 Ill. App. 389; Hall v. Hall, 34 Ind. 314.

¹²⁶ Ellicott v. Nichols, 7 Gill (Md.), 85; Waughop v. Bartlett, 165 Ill. 124.

the debt, has a right to enforce such bond for his own indemnity against the surety on the appeal bond; that is, where the judgment has been appealed by the principal debtor without the consent of the surety, and the surety has afterwards paid the judgment, he has an equitable right to be subrogated to the benefit of the appeal bond.¹²⁷

In such case the equity of the first surety is superior, and he is entitled to be subrogated to the rights of the creditor against the second surety.¹²⁸ But if the subsequent surety becomes bound for a purpose in which both the principal and the prior surety have an interest, and the assent of the prior surety is expressly given, or may be inferred, the rule is otherwise, and the last surety has a right to look for his indemnity not only to his principal, but to such fixed securities as had been given to the creditor when his engagement was entered into, and on the faith of which he may have incurred his obligation.¹²⁹

In some jurisdictions neither the prior nor subsequent surety is entitled to subrogation against the other.¹³⁰

§ 169. GUARANTORS.—A guarantor on a promissory note, when the maker fails to pay it, may pay it, and the law will imply a promise on the part of the maker to repay, and the guarantor will be subrogated to the rights of the holder to whom he makes payment;¹³¹ and the guarantor will be substituted to the rights and securities of the holder of the note.¹³²

§ 170. SURETY'S DEFENSE—IN COURTS OF EQUITY OR OF LAW.—Under the common law it is held that a surety can seek

¹²⁷ *Parsons v. Briddock*, 2 Vern. 608; *Friberg v. Donovan*, 23 Ill. App. 58.

¹²⁸ *Hartwell v. Smith*, 15 Ohio St. 200; *Bradenburg v. Flynn*, 12 B. Mon. 397; *Pott v. Nathans*, 1 Watts & S. 155; *Dunlap v. Foster*, 7 Ala. 734.

¹²⁹ *Dillon v. Scofield*, 11 Neb. 419; *Hartwell v. Smith*, 15 Ohio St. 200; *Mouson v. Drakeley*, 40 Conn. 552.

¹³⁰ *Holmes v. Day*, 108 Mass. 563; *Morse v. Williams*, 22 Me. 17; *Semmes v. Naylor*, 12 Gill & J. (Md.) 358. See secs. 9, 209.

¹³¹ *Hamilton v. Johnson*, 82 Ill. 39; *Voltz v. Bank*, 158 Ill. 532.

¹³² *Rand v. Barrett*, 66 Iowa, 731; *Washington Bank v. Shurtleff*, 4 Met. 30.

relief only in a court of equity, for the purpose of showing that he has been discharged, or for other relief. But the doctrine is now that whatever will discharge a surety in equity can be interposed in a suit at law, unless there be some complications of interest as would prevent a court from affording adequate relief. And although relief may be had in both courts, a court of equity having jurisdiction will not send a surety to a court of law to seek his defense.¹³³

So where the makers of a note are released by a subsequent destruction of the collateral security, they may make their defense available in an action at law, upon the note.¹³⁴ And generally whatever defense may be set up in a court of equity against the surety's liability may be averred and proved in a court of law.¹³⁵

The decided American authority is in favor of the admissibility of the defense at law. However, some courts hold that a surety must go into equity for his defense,¹³⁶ and many English decisions are in accord with this doctrine.¹³⁷

§ 171. REMEDIES OF CREDITOR.—The creditor may sue the principal alone, and the principal cannot complain, because it could be of no benefit to him in any case to have his surety adjudged jointly liable with him upon the cause of action, as the ultimate liability must fall upon the principal.¹³⁸ Or the creditor may sue both in one action,¹³⁹ or the surety alone. But a judgment against the surety is not binding on the principal where he was not a party to the suit.¹⁴⁰ And in some States

¹³³ *Philpot v. Briant*, 4 Bing. 717; *Mayhew v. Crickett*, 2 Swan. 185; *Eyre v. Everett*, 2 Russ. 382.

¹³⁴ *Rogers v. Trustees*, 46 Ill. 428.

¹³⁵ *Smith v. Clopton*, 48 Miss. 66; *King v. Baldwin*, 2 Johns. Ch. 555; *People v. Jansen*, 7 Johns. 332; *Baker v. Briggs*, 8 Pick. 122.

¹³⁶ *Anthony v. Fritts*, 45 N. J. L. 1; *Shute v. Taylor*, 61 N. J. L. 256; *Grier v. Flitercraft*, 57 N. J. Eq. 556.

¹³⁷ *Strong v. Foster*, 17 C. B. 201; *Manley v. Baycut*, 2 El. & B. 46; *Price v. Edwards*, 10 B. & C. 578; *Hollier v. Eyre*, 9 Cl. & F. 1.

¹³⁸ *Fourth Nat. Bank v. Mayer*, 100 Ga. 87.

¹³⁹ *Wheeler v. Rohrer*, 21 Ind. App. 477.

¹⁴⁰ *Benjamin v. Ver Nooy*, 36 App. Div. 581.

if a surety signs as a principal, he cannot set up as a defense that he is a surety, in an action at law. His remedy is in equity to restrain the collection of the note.¹⁴¹ But this is contrary to the great weight of authority. Thus, it may be shown by parol evidence in a court of law that one of the makers of a note signed as surety, which was known to the payee, though on the face of the note he is a joint maker; and he is not obliged to go into a court of equity to set up his equitable defense.¹⁴² Such evidence does not alter or vary the written contract, as the facts found simply operate when the knowledge of it is brought home to the creditor, to prevent him from changing the contract and making a different one with the principal debtor without the consent of the surety, or from impairing the rights of the latter by releasing any security or omitting to enforce the contract when requested.¹⁴³

The contrary or equitable doctrine is that the right of the surety to have his *status* respected, does not pertain to his contract, as an implied incident, but as a mere equity, which it is irregular to enforce in a court of common law, so long as it is important to preserve the distinction between procedure of a legal and that of an equitable forum.¹⁴⁴

§ 172. DEATH OF PRINCIPAL.—When the principal debtor in an obligation, to which there are sureties, dies, the creditor may look to the sureties as primarily liable to perform the contract, and need not, unless so ordered by statute, present the claim to the administrator of the deceased principal for allow-

¹⁴¹ Grier v. Flitcraft, 57 N. J. Eq. 556; Anthony v. Fritts, 45 N. J. L. 1; Shute v. Taylor, 61 N. J. L. 256.

¹⁴² Lime Rock Bank v. Mallett, 34 Me. 547; Carpenter v. King, 9 Met. 511; Grafton Bank v. Kart, 4 N. H. 221; Archer v. Douglass, 5 Denio, 307; Branch Bank v. James, 9 Ala. 949; Hubbard v. Gurney, 64 N. Y. 459; Bank v. Jeffs, 15 Wash. 231; Stillwell v. Aaron, 69 Mo. 539; Ward v. Stout, 32 Ill. 399; Flynn v. Mudd, 27 Ill. 323; Drescher v. Fulham, 11 Colo. App. 62; Smith v. Shelden, 35 Mich. 42; Piper v. Newcomer, 25 Iowa, 221; Stewart v. Parker, 55 Ga. 656; Irvine v. Adams, 48 Wis. 468.

¹⁴³ Hubbard v. Gurney, 64 N. Y. 457.

¹⁴⁴ Grier v. Flitcraft, 57 N. J. Eq. 556.

ance and payment.¹⁴⁵ But in some jurisdictions statutory provisions provide that where the estate of the deceased is sufficient to pay the claims, the failure of the creditor to file his claim against the estate, shall operate to release the surety on the contract.¹⁴⁶

§ 173. DEBT BARRED AGAINST THE PRINCIPAL.—Although the debt may be barred by limitations as against the principal, yet if judgment may be rendered against the surety, which is done and he pays it, such surety may recover against the principal or against his estate in case of his death. The right of action in favor of the surety arises when he pays the debt, and is not based upon the original contract itself, but upon the implied contract which exists by law between the principal and surety in such cases.¹⁴⁷

The surety's right in such case is not based upon subrogation to the claims of the creditor, but on the implied obligation of his principal to reimburse him when he pays the debt, and exists though the debt to the payee, when discharged by the surety, is barred as to the principal debtor.¹⁴⁸ Thus, where the creditor fails to present his claim to the administrator of the deceased debtor within the time provided by statute, and the claim becomes barred, the creditor may then bring suit against the surety on the secured debt and recover judgment, and after payment of the judgment by the surety, the latter may then recover from the decedent's estate the amount paid, with costs and interest.¹⁴⁹

This is on the ground that the obligation of the principal to indemnify the surety, does not arise out of his original con-

¹⁴⁵ Ray v. Brenner, 12 Kan. 105; Willis v. Chowning, 90 Tex. 617; Bredenburg v. Snyder, 6 Iowa, 39; Boardwall v. Paige, 11 N. H. 437; People v. White, 11 Ill. 341.

¹⁴⁶ Waughop v. Bartlett, 165 Ill. 124.

¹⁴⁷ Fairies v. Cockerell, 88 Tex. 428; Wood v. Leland, 1 Met. 387; Reeves v. Pullian, 7 Baxt. 119; Peaslee v. Reed, 10 N. H. 489; Crosby v. Wyatt, 23 Me. 156; Marshall v. Hudson, 9 Yerg. 57.

¹⁴⁸ Willis v. Chowning, 90 Tex. 617.

¹⁴⁹ Marshall v. Hudson, 9 Yerg. 57; Pearson v. Goyle, 11 Ala. 280; Willis v. Chowning, 90 Tex. 617.

tract with the creditor, but is implied by the law from his relation to the surety, and it continues until the liability of the surety is terminated.¹⁵⁰ The principal's liability arises when the surety has performed the contract.¹⁵¹

There are decisions which hold a contrary view, that when the claim is barred as against the principal debtor, it is thereby barred also as against the surety,¹⁵² but they are against the great weight of authority.

¹⁵⁰ *Hollinsbee v. Ritchey*, 49 Ind. 261.

¹⁵¹ *Lamb v. Withrow*, 31 Iowa, 164.

¹⁵² *Auchawpaugh v. Schmitt*, 70 Iowa, 642; *State v. Blake*, 2 Ohio St. 147; *Dorsey v. Wyman*, 6 Gill (Md.), 59. See sec. 190.

CHAPTER VII.

RIGHTS AND REMEDIES OF SURETY AS TO PRINCIPAL.

§ 174. **LIABILITY OF PRINCIPAL TO SURETY.**—The contract of the principal with the surety to indemnify him for payment which the latter may make to the creditor in consequence of the liability assumed, takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the debt is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages by which the principal is liable under his original agreement to indemnify the surety.¹ Thus, the liability of a principal in a promissory note to his surety is incurred when the note is executed and delivered, and not at the time the surety is compelled to pay the same.² If a stranger pays the debt and the surety reimburses him, the surety can recover the amount from the principal.³

§ 175. **PAYMENT BEFORE DUE BY SURETY.**—The surety may pay the debt before it is due, if he thereby causes no injury to the principal, but he cannot recover from the principal until the debt matures.⁴ The surety need not wait until the creditor sues him. He may consult his own safety and resort to any measure calculated to assure him of it, which does not involve injury to the principal, but he cannot compel payment by the

¹ *Pennington v. Seal*, 49 Miss. 525; *Williams v. Bank*, 11 Md. 242; *Rice v. Southgate*, 16 Gray, 142; *Miller v. Stout*, 5 Del. Ch. 262; *Martin v. Ellerbe*, 70 Ala. 335; *Choteau v. Jones*, 11 Ill. 300; *Tibey v. Swenson*, 32 Kan. 224; *Wilson v. Crawford*, 47 Iowa, 469; *Covey v. Neff*, 63 Ind. 391; *Thomas v. Liebke*, 81 Mo. 675; *Konitzky v. Meyer*, 40 N. Y. 571

² *Washburn v. Blundell*, 75 Miss. 266.

³ *Harper v. McVeigh*, 82 Va. 751.

⁴ *Ross v. Menefee*, 125 Ind. 432.

principal until the maturity of the debt.⁵ And the payment of the debt before maturity is not necessarily voluntary; and so when a co-surety has paid the debt before maturity, he can compel contribution from the other co-sureties when the debt becomes due.⁶

§ 176. PART PAYMENT BY SURETY.—In some cases the surety can compromise the debt and pay only part for a full satisfaction; or he may pay part and the principal the balance. In such cases the surety can compel his principal to reimburse him for his outlay.⁷ And if the surety is obliged to make several payments, he may bring several suits for the amounts paid.⁸ Such may be the case when the surety is compelled to pay coupon notes as they fall due, or the payee has the option, which is seldom the case, to demand a partial payment of the debt at different times. But the surety has no right to pay in installments when the contract does not so stipulate, and then bring several suits against the principal. But the rule is different in Louisiana, and in that State the surety is entitled to make partial payments, and to bring a suit on each payment, because, it is held, the obligation of the principal toward the surety is not indivisible.⁹ The Louisiana court cites *Pownal v. Ferraud*¹⁰ as authority for that doctrine. But that case does not declare any such doctrine. It holds that an indorser, as a surety, who makes a part payment on a bill or note, may hold his principal for the amount so paid; that is, an indorser of a bill being sued by the holder, who pays part of the sum mentioned in the bill, may recover the same from the acceptor in an action for money paid for his use.

That a surety can at his option pay the debt of his principal

⁵ *Armstrong v. Gilchrist*, 2 Johns. Cas. 429; *White v. Miller*, 47 Ind. 385.

⁶ *Craig v. Craig*, 5 Rawle, 91.

⁷ *Davies v. Humphreys*, 6 Mees. & W. 152; *Pownal v. Ferraud*, 6 Barn. & Cr. 439; *Wilson v. Crawford*, 47 Iowa, 469; *Williams v. Williams*, 5 Ohio, 444; *Hall v. Hall*, 10 Humph. (Tenn.) 352; *Wright v. Butler*, 6 Wend. 284.

⁸ *Bullock v. Campbell*, 9 Gill (Md.), 182.

⁹ *Newman v. Coza*, 2 La. Ann. 642; *Pickett v. Bates*, 3 La. Ann. 627.

¹⁰ 6 Barn. & Cr. 439.

in partial payments, and then institute a suit against his principal for each payment, is not the law, for he has no right to split up his actions for the collection of a debt.¹¹ If circumstances should compel him to make partial payments, the rule might be changed, and he then could bring his several actions against his principal.¹²

In case of joint sureties, when each furnishes money to pay the principal's debt, an action to recover from the principal must be separate and not joint. But if the debt is paid by an agent of the sureties out of his own funds, then the action by the sureties must be joint.¹³

§ 177. THE SURETY MUST BE UNDER A LEGAL OBLIGATION TO PAY.—The surety must be under a legal obligation to pay the debt in order to hold his principal. After the debt of the principal is due, the law implies that the principal requests such payment, and also implies a promise to pay the surety. If the surety is under no legal obligation to pay, then the implied request of the principal to pay the debt will not arise, nor the implied promise to repay the surety, and if the surety pays under such circumstances he cannot recover from the principal.¹⁴ Thus, where the surety is released from liability, and he then pays the debt of the principal, he cannot hold the principal liable to him for the payment. Because he is no longer a surety and is not entitled to any of the rights growing out of such relation. He occupies no better attitude than any other person paying the debt of another without request or authority, implied or express.¹⁵

But a request by the principal to pay, and a request to enter into a contract of suretyship may be implied.¹⁶ In an ordinary

¹¹ Jones v. Trimble, 3 Rawle, 388.

¹² Bullock v. Campbell, 9 Gill (Md.), 182.

¹³ Ross v. Allen, 67 Ill. 317; Whitbeck v. Ramsey, 74 Ill. App. 544; Gould v. Gould, 8 Cow. 168; Appleton v. Bascom, 3 Met. 169.

¹⁴ Kimble v. Cummins, 3 Met. (Ky.) 327.

¹⁵ Spillman v. Smith, 15 B. Mon. 134.

¹⁶ Snell v. Warner, 63 Ill. 176; Ricketson v. Giles, 91 Ill. 154; Hall v. Smith, 5 How. (U. S.) 96.

case where the principal makes default in the payment of the debt or the performance of the contract, the surety need not wait for suit to be brought, but may, as soon as his liability arises, pay and discharge the debt. It is not necessary to obtain consent of the principal, because the law implies a request to the surety so to act in behalf of his principal. And money thus paid is paid for the use of the principal, and the surety may maintain an action against his principal for it.¹⁷ But if the surety voluntarily pays a note for which his principal is not liable, he cannot recover from his principal.¹⁸ Thus, where a note is given on an election bet, and is therefore void, if the surety pays it, he has no recourse on the principal.¹⁹

§ 178. PROPER ACTION FOR SURETY TO BRING AGAINST PRINCIPAL.—The proper action to bring against the principal by the surety is, at common law, *assumpsit* for money paid at his request.²⁰ So an action for money had and received will not lie for a surety who has paid the debt for his principal; the action must be for money laid out and expended for the principal.²¹ Where parties are jointly and severally liable to the creditor, one who pays the debt may bring an action for money paid, against his co-surety for contribution.²²

Where the surety pays a note of his principal, whether he can have the note assigned to him and then sue the principal upon it, is a question on which the authorities are irreconcilable. It is held by one line of decisions that where a surety pays a note and has it assigned to him, he is entitled to maintain an action of implied *assumpsit* for the amount paid, and he can not sustain an action upon the note against his principal;²³ because the

¹⁷ Appleton v. Bascom, 3 Met. 169; Lidderdale v. Robinson, 2 Brock. 159; Pitt v. Prussard, 8 Mees. & W. 538; Hazleton v. Valentine, 113 Mass. 472.

¹⁸ Sponhauer v. Malloy, 21 Ind. App. 287.

¹⁹ Harley v. Stapleton, 24 Mo. 248.

²⁰ Mowry v. Adams, 14 Mass. 337.

²¹ Ford v. Keith, 1 Mass. 139; Powell v. Smith, 8 Johns. 249.

²² Steckel v. Steckel, 28 Pa. St. 233; Mansfield v. Edwards, 136 Mass. 15.

²³ Frevert v. Henry, 14 Nev. 191; Hulet v. Soullard, 26 Vt. 295; Copis v. Middleton, 1 Turn. & Russ. 224; Hodgson v. Shaw, 3 Mylne & K. 183; Smith v. Sawyer, 5 Me. 504.

payment by the surety goes to the whole promise of the note, and when the entire promise of the note is met and extinguished, it cannot afterwards be received as a subsisting contract against the principal co-signer, and the surety cannot therefore bring suit on it against the principal.²⁴

The principle as to the right of an indorser upon a note is different from that which controls a surety. For a note taken up by the indorser who is not directly liable on the note may be again put in circulation, or upon the market, and the promisor is not, in such case, prejudiced by such a transfer, and the note remains good against the maker. Where the note is taken up under such circumstances it is not in fact paid. But where one of several joint obligors or promisors, who is liable directly upon the note for its whole amount, pays such note, the note is necessarily extinguished, and hence a surety cannot use it against his principal.²⁵

The other line of authorities hold that the payment of a note by the surety is not, as between himself and the principal, an extinguishment of the same, and the surety's right of action against the principal is upon the note, and not on implied *assumpsit*,²⁶ because the surety may be substituted to the place occupied by the creditor, not only as to collaterals, but as to the original note.²⁷

§ 179. SURETY TO ONE OF PARTNERS.—The surety can look for reimbursement only to the rights of his principal, and not to a stranger. So where a surety is on the bond of one of several partners, he cannot look to the partnership for indemnity, if he has to pay the debt, though the bond was given to secure a partnership debt. The surety cannot charge any other person as his principal except the one who was principal at the time

²⁴ *Hopkins v. Farwell*, 32 N. H. 425; *Joyce v. Joyce*, 1 Bush, 474; *Bryant v. Smith*, 10 Cush. 171. See *Hurd's Ill. Stat.* (1895), 1062, sec. 7c.

²⁵ *Davis v. Stevens*, 10 N. H. 186.

²⁶ *Tutt v. Thornton*, 57 Tex. 35, following *Sublet v. McKinney*, 19 Tex. 438, and overruling *Hollinan v. Rogers*, 6 Tex. 91.

²⁷ *Lumpkins v. Mills*, 4 Ga. 343. Compare *Boyd v. Beville*, 91 Tex. 439.

of making the contract of suretyship. No privity can exist between the parties except that which arises on the bond or contract, and implied *assumpsit* cannot arise beyond the parties on the bond or in the contract.²⁸

In like manner, where a promissory note is knowingly taken by a creditor of one partner for his separate debt, but signed by such partner in the name of the firm, but without the consent of the other partners, and also executed by a person who supposed he was surety for the firm, is not binding upon the partnership, nor upon the surety.²⁹ The instrument must show the privity between the parties, and cannot be extended beyond such limits.³⁰

§ 180. SURETY GIVING HIS OWN NOTE IN PAYMENT OF THE DEBT.—The surety may pay the principal's debt after due, by giving his own negotiable note, provided the creditor receives it as payment, and thereupon may maintain an action against the principal for reimbursement.³¹ However, the authorities are not uniform upon this subject. In some of the States it is held that the surety cannot recover of the principal until he has paid the money, and that the giving of a note is not sufficient.³² Many of the cases hold that if the surety discharges the debt by his negotiable note, he can maintain an action against the principal; but if he pays the debt by means of a bond or any non-negotiable instrument, he cannot maintain an action until he pays it, because such non-negotiable instrument is not analogous to money.³³

²⁸ Tom v. Goodrich, 2 Johns. 213; Krafts v. Creighton, 3 Rich. (S. Car.) 273.

²⁹ Hagar v. Mounts, 3 Blackf. 57.

³⁰ Harter v. Moore, 5 Blackf. 367.

³¹ Doolittle v. Dwight, 2 Met. 561; Pearson v. Parker, 3 N. H. 366; Witherby v. Mann, 11 John. 518; Sapp v. Aiken, 68 Iowa, 699; Rizer v. Callen, 27 Kan. 339; White v. Miller, 47 Ind. 385.

³² Brisindine v. Martin, 1 Ired. (N. Car.) 286; Nowland v. Martin, 1 Ired. (N. Car.) 397; Romine v. Romine, 59 Ind. 351; Lynch v. Hancock, 14 S. Car. 66.

³³ Boulevard v. Robinson, 8 Tex. 327; Peters v. Bayhill, 1 Hill (S. Car.), 237; Barth v. Graf, 101 Wis. 27; Stone v. Farwell, 83 Cal. 547; Bennett v.

The reason of the rule is, that, if the creditor takes the negotiable note of the surety as absolute payment, the surety can then sue the principal for the debt, which must of course be due; by giving his own obligation he discharges the original debt of the principal, and the latter is as much benefited as if he had discharged it by actual payment of money. But the rule must be applied only where the surety, by giving his note, has extinguished the original debt. This rule has been criticised because the surety may recover the whole amount from his principal and never pay his own note, or get the debt reduced by compromise, and thus violate the cardinal rule that the surety shall not speculate out of the principal.

§ 181. DEBT SATISFIED OUT OF THE SURETY'S PROPERTY.—If the surety pays his principal's debt by giving property,³⁴ or if his property be taken on legal process,³⁵ he can, at once, bring action against his principal for reimbursement. Thus, where the surety's land has been levied on to satisfy the debt of his principal, he may maintain an action against the principal for money paid;³⁶ and so by paying the principal's debt in land, the surety can begin immediate action against his principal for money paid and expended for the latter.³⁷

§ 182. WHEN THE SURETY'S RIGHT OF ACTION IS COMPLETE.—It is settled that no action can be maintained by the surety upon an implied promise, if the principal has made default, without first making payment of the debt,³⁸ except where the

Buchanan, 3 Ind. 47; Morrison v. Berkey, 7 Serg. & R. 238; Cummins v. Hockley, 8 Johns. 202; Romine v. Romine, 59 Ind. 346; Huse v. Ames, 104 Mo. 91.

³⁴ Bonney v. Seely, 2 Wend. 481.

³⁵ Burns v. Parish, 3 B. Mon. 8; Clemens v. Prout, 3 Stew. & P. (Ala.) 345.

³⁶ Lord v. Staples, 23 N. H. 448.

³⁷ Bonney v. Seely, 2 Wend. 481.

³⁸ Lane v. Westmoreland, 79 Ala. 372; Stone v. Hammell, 83 Cal. 547; Kimmel v. Lowe, 28 Minn. 265; Covey v. Neff, 63 Ind. 392; Hearn v. Keath, 63 Mo. 84.

principal has broken his promise to do or refrain from doing some particular act or thing or to save the surety from some charge or liability. Thus, where the maker of a note agrees with the surety to pay the amount of the note to the payee on a given day, but makes default, the surety can recover from his principal without first making payment of the note.³⁹

In like manner, where a partnership is dissolved by one partner leaving the firm with the debts outstanding, and a new firm agrees with the outgoing partner to pay the debt of the old partnership and save him harmless from any costs, trouble or liability on the account of the same, upon default of the new firm, the partner who withdrew can recover against the new firm without first paying such debts.⁴⁰ When an obligation to do a particular thing or to pay a debt for which the covenantee is liable, or to indemnify against liability, is broken, the right of action is complete upon the principal's failure to do the particular thing he agreed to perform or to pay the debt or discharge the liability.⁴¹

If the contract be one of indemnity simply, and nothing more, then damages must be shown before the party indemnified is entitled to recover; but if there be an affirmative contract to do a certain act or to pay a certain sum or sums of money, then the surety can sue the principal before paying the debt to the creditor.⁴²

§ 183. LIABILITY OF PRINCIPAL FOR SURETY'S COSTS AND INTEREST.—The surety can recover back the money paid by him for the principal's debt with interest.⁴³ The surety can also

³⁹ *Loosemore v. Radford*, 9 Mees. & W. 657.

⁴⁰ *Lathrop v. Atwood*, 21 Conn. 117.

⁴¹ *Kohler v. Mattage*, 72 N. Y. 259; *Merchants, etc., Bank v. Cumings*, 149 N. Y. 360; *Barth v. Graf*, 101 Wis. 27.

⁴² *Wilson v. Stilwell*, 9 Ohio St. 470; *Post v. Jackson*, 17 Johns. 239; *Dorrington v. Minnick*, 15 Neb. 397; *Hall v. Nash*, 10 Mich. 303; *Holmes v. Rhodes*, 1 Bos. & P. 638.

⁴³ *Barth v. Graf*, 101 Wis. 27; *Whereatt v. Ellis*, 103 Wis. 348; *Hearne v. Heath*, 63 Mo. 84; *Child v. Powder Works*, 44 N. H. 354; *Hayden v. Cabot*, 17 Mass. 169.

recover the reasonable costs he has been compelled to pay in his action brought to recover from the principal.⁴⁴ Upon this implied contract the surety cannot recover a greater amount than he has paid for the principal with interest. So upon an action to reimburse himself for a payment of a note which he had signed providing for attorney fees upon its collection, he cannot recover for such fees, for the action is upon the implied promise, and not upon the note.⁴⁵ But in those States where the surety can sue on the note which he has paid for his principal, he can recover attorney's fees stipulated in the note,⁴⁶ because he is subrogated to the place of the creditor, who might collect such principal with interest and also the attorney fees.⁴⁷

Where the surety imposes improper defenses, thereby largely increasing the cost of litigation, he will be charged with the cost of the suit.⁴⁸ So the principal is not liable for the costs and expenses unnecessarily incurred by the surety in litigation carried on by him in order to get rid of his liability or defeat the efforts of the party seeking to enforce it.⁴⁹ It is incumbent upon the surety seeking to recover from his principal costs and expense incurred in litigation, to show that the litigation was entered into in good faith and upon reasonable grounds, and was a measure of defense necessary to the interest of himself and principal, and was calculated so to result.⁵⁰

An accommodation indorser has two remedies; he may sue on the note or sue for money paid. If he sues on the note he can only recover the amount with interest. If he sues for money paid he can recover the amount with interest and also the costs.⁵¹

⁴⁴ *Apgar v. Wilson*, 24 N. J. L. 812; *Thompson v. Taylor*, 72 N. Y. 32.

⁴⁵ *Gieseke v. Johnson*, 115 Ind. 309.

⁴⁶ *Carpenter v. Minter*, 72 Tex. 370.

⁴⁷ *Worsham v. Stevens*, 66 Tex. 89.

⁴⁸ *May v. May*, 19 Fla. 373.

⁴⁹ *Wynn v. Brooke*, 5 Rawle, 106.

⁵⁰ *Whitworth v. Tilman*, 40 Miss. 76; *Redfield v. Haight*, 27 Conn. 31; *Cranmer v. McSwords*, 26 W. Va. 412; *Thompson v. Taylor*, 72 N. Y. 32.

See, also, *Holmes v. Ward*, 24 Barb. 546.

⁵¹ *Burton v. Stewart*, 62 Barb. 194.

An indorser who has been compelled to pay cannot recover costs against the drawer, because he ought to pay without suit.⁵² The surety may recover both the penalty and interest.⁵³

§ 184. RECOVERY OF CONSEQUENTIAL DAMAGES.—In some cases consequential damages may be recovered. Thus, where the surety can show that by reason of the non-payment of the debt, he has suffered damages beyond the principal and interest which he had been compelled to pay, he is entitled to recover that damage from the principal.⁵⁴ But this is seldom the case, and the general rule is the surety cannot recover of the principal remote or consequential damages arising out of the contract of suretyship.⁵⁵ Thus, a surety who pays the debt is not entitled to remuneration for loss sustained by a forced or hasty sale of his property to raise the money, and can only recover the money paid with legal interest by way of damages. To provide against other consequences, the surety must take special indemnity. Hence, if the surety is put into prison or his goods are sold at a sacrifice, this will not be legal grounds of suit for indemnity, because they may be avoided by payment which he agreed to make in case the principal defaulted.⁵⁶

§ 185. PAYMENT OF USURY BY THE SURETY.—A surety may pay a usurious debt of his principal, under ordinary circumstances, and then collect the whole amount from his principal, unless the principal before payment has notified him not to pay it.⁵⁷ But if the usury makes the debt or note void, and the

⁵² *Simpson v. Griffin*, 9 Johns. 131; *Roach v. Thompson, M. & M.* 487. Compare *Whitehouse v. Glass*, 7 Grant Ch. 47.

⁵³ *Whereatt v. Ellis*, 103 Wis. 348. See, also, *United States v. Curtis*, 100 U. S. 119; *Bank v. Smith*, 12 Allen, 293; *Frink v. Express Co.*, 82 Ga. 33; *Benchfield v. Haffey*, 34 Kan. 42.

⁵⁴ *Badely v. Bank*, 34 Ch. Div. 536.

⁵⁵ *Vance v. Lancaster*, 3 Hayw. (Tenn.) 130.

⁵⁶ *Hayden v. Cabot*, 17 Mass. 169; *Powell v. Smith*, 8 Johns. 250.

⁵⁷ *Ford v. Keith*, 1 Mass. 139; *Jackson v. Jackson*, 51 Vt. 253; *Kock v. Block*, 29 Ohio St. 565. Compare *Hargraves v. Lewis*, 3 Ga. 162; *Lueking v. Gegg*, 12 Bush, 298; *Thurston v. Prentiss*, 1 Mich. 193; *Jones v. Joyner*, 8 Ga. 562.

surety, knowing such to be the case, pays the whole amount without request by the principal, the surety is not entitled to relief, even under a mortgage to secure him against liability as such surety.⁵⁸

When the defense of usury is not available to the principal, it cannot be to the surety.⁵⁹

§ 186. WHAT AMOUNT THE SURETY CAN COLLECT FROM THE PRINCIPAL.—The surety can collect from his principal only the amount he has paid. If the creditor remits the debt as a gratuity to the surety, the surety cannot recover anything from the principal, because he has lost nothing. If the surety extinguishes the debt for less than the whole amount due he can only recover what he actually paid.⁶⁰ And so if the surety pays the debt in depreciated currency, he can only recover from the principal the market value of the currency at the time payment was made.⁶¹

The contract between the principal and surety is for indemnity only, and therefore if the surety discharges the obligation for a less sum than its full amount he can only claim against the principal the sum so paid.⁶² But an accommodation indorser has the same right to purchase negotiable paper on which he is liable with any other person, and so when he becomes purchaser of such paper, he is entitled to recover the full amount due from the maker, without regard to what he paid for it.⁶³

§ 187. JOINT SUIT BY SURETIES.—Sureties cannot maintain a joint action against their principal unless the payment is made from a joint fund. When each surety furnishes money to pay

⁵⁸ *Roe v. Kiser*, 62 Ark. 92.

⁵⁹ *Pugh v. Conover*, 11 W. Va. 523; *Freese v. Brownell*, 35 N. J. L. 285.

⁶⁰ *Bonney v. Seely*, 2 Wend. 481; *Reed v. Norris*, 2 Myl. & Cr. 362; *Butcher v. Chandler*, 14 Ves. 567; *Snyder v. Blair*, 33 N. J. Eq. 208; *Delaware, etc., R. R. Co. v. Iron Co.*, 38 N. J. Eq. 151.

⁶¹ *Butler v. Butler*, 8 W. Va. 674; *Matthews v. Hall*, 21 W. Va. 510.

⁶² *Kendrick v. Forney*, 22 Gratt. 748; *Waldrip v. Black*, 74 Cal. 409; *Carpenter v. Minter*, 72 Tex. 370; *Eaton v. Lambert*, 1 Neb. 339; *Owings v. Owings*, 3 J. J. Marsh. 590; *Gieseke v. Johnson*, 115 Ind. 308.

⁶³ *Fowler v. Strickland*, 107 Mass. 552.

the debt of the principal, the action to recover the same must be separate, and not joint.⁶⁴ But where several parties, each of whom is responsible for an entire sum due from another, join in making the payment of that sum by a contribution agreed on among themselves for that purpose, they may join in one action to recover it from the person for whose benefit the payment has been made.⁶⁵ Where there is no community of interest in the money paid, a joint action cannot be maintained.⁶⁶ But the rule is otherwise where there is a community of interest in the fund appropriated to the payment of the debt. Thus, where the sureties deposit a sum with the creditor to their joint order, to be held as collateral security for their joint liability, and from which such liability is finally discharged, that is a joint fund, although made up in the first instance from individual deposits by several sureties.⁶⁷ In general, sureties may sue jointly when they have satisfied the debt by giving their joint note;⁶⁸ or if they pay from a joint fund which they have provided for that purpose;⁶⁹ or if they have paid a joint judgment in equal shares.⁷⁰ But where each has paid his share, the right to recover is several, and the sureties must enforce their rights by separate suits.⁷¹

§ 188. PAYMENT OF JUDGMENT BY SURETY.—When the surety has paid the judgment rendered against him individually,

⁶⁴ *Whitbeck v. Ramsey*, 74 Ill. App. 524; *Appleton v. Bascom*, 3 Met. 169; *Thomas v. Carter*, 63 Vt. 609; *Lombard v. Cobb*, 14 Me. 222; *Pearson v. Parker*, 3 N. H. 366; *Osborne v. Harper*, 5 East, 225.

⁶⁵ *Clapp v. Rice*, 15 Gray, 557.

⁶⁶ *Doremus v. Selden*, 19 Johns. 213.

⁶⁷ *Thomas v. Carter*, 63 Vt. 609. See, also, *Ross v. Allen*, 67 Ill. 317; *Gould v. Gould*, 8 Cow. 168.

⁶⁸ *Ross v. Allen*, 67 Ill. 317; *Rizer v. Callen*, 27 Kan. 339; *Doolittle v. Dwight*, 2 Met. 561.

⁶⁹ *Jewett v. Comforth*, 3 Me. 107; *Whitbeck v. Ramsey*, 74 Ill. App. 524; *Thomas v. Carter*, 63 Vt. 609.

⁷⁰ *Fletcher v. Jackson*, 23 Vt. 581; *Clapp v. Rice*, 15 Gray, 557; *Rizer v. Callen*, 27 Kan. 339; *Snider v. Greathouse*, 16 Ark. 72.

⁷¹ *Sevier v. Roddie*, 51 Mo. 580; *Doremus v. Selden*, 19 Johns. 213; *Boggs v. Curtin*, 16 Serg. & R. 211; *Prescott v. Newell*, 39 Vt. 82; *Whitbeck v. Ramsey*, 74 Ill. App. 524.

or jointly against him and his principal, he can recover from the principal the amount paid to discharge the debt, and this is so though the surety did not well defend the suit.⁷² And this is the law though the surety lets the judgment go by default, he not knowing of any defense to it.⁷³

It behooves the principal, if he has any defense, to set it up at the trial, whether the action is brought against him or the surety separately, or against both. If he does not, he waives his rights in the matter, and cannot set up such defense in a suit against him by the surety for reimbursement.⁷⁴ And in general, the surety, upon paying the judgment against him or against both, may recover from the principal.⁷⁵

§ 189. RIGHT TO TAKE INDEMNITY FROM THE PRINCIPAL.—The principal may indemnify the surety against loss, and the contract will be valid.⁷⁶ The contingent liability of the surety and the promise to pay if the principal does not is a sufficient consideration for the indemnity contract.⁷⁷ Justice is promoted by permitting a surety to take from his principal some obligation upon which he may acquire a lien upon the property of the principal to provide security for his indemnity in case of need before he has actually been compelled to pay the debt.⁷⁸ But such security can only be applied where the surety has either paid the debt, or has become immediately liable for its payment;⁷⁹ and the surety may be compelled to apply the collaterals or security in his hands to the payment of the debt.⁸⁰

At common law an insolvent debtor has a right to sell or trans-

⁷² *Rice v. Rice*, 14 B. Mon. 417; *Doran v. Davis*, 43 Iowa, 86.

⁷³ *Stinson v. Brennan*, Cheves (S. Car.), 15.

⁷⁴ *Hare v. Grant*, 77 N. Car. 203; *Konitzky v. Meyer*, 49 N. Y. 571.

⁷⁵ *Chandler v. Higgins*, 109 Ill. 602; *Kendrick v. Rice*, 16 Tex. 254; *Konitzky v. Meyer*, 49 N. Y. 571.

⁷⁶ *Essex Chosen Freeholders v. Lindsley*, 41 N. J. Eq. 189; *Tudor v. DeLong*, 18 Mont. 499; *Kassing v. Bank*, 74 Ill. 16.

⁷⁷ *Haseltine v. Guild*, 11 N. H. 390.

⁷⁸ *Little v. Little*, 13 Pick. 426; *Kramer v. Bank*, 15 Ohio, 253; *Grimes v. Sherman*, 25 Neb. 843.

⁷⁹ *Constant v. Matteson*, 22 Ill. 546.

⁸⁰ *McKnight v. Bradley*, 10 Rich. Eq. (S. Car.) 557.

fer the whole or any portion of his property to one or more of his creditors in payment of or to secure his debt, when that is his honest purpose, although the effect of the sale or transfer is to place his property beyond the reach of his other creditors and render their debts uncollectible.⁸¹

§ 190. WHEN THE PRINCIPAL IS NOT LIABLE.—In order to make the principal reimburse the surety who has paid the debt, the principal must be liable for the debt paid, except in case of disability.⁸² For the right of the surety to recover in a suit against the principal for paying his debt depends on the question whether the surety is legally bound to pay it. The voluntary payment by the surety, although made under a mistaken apprehension as to his legal liability, will not make the principal liable. The surety's recovery can only arise from payment of money which he was legally bound to pay according to the original contract of suretyship.⁸³ If the surety knows of facts which will discharge him or his principal, and pays the creditor, then he cannot recover from the principal.⁸⁴ If the surety, to shield himself against liability in another transaction, procures his debtor to surrender to him a debt of the principal, then he cannot recover from his principal.⁸⁵ And so where the transaction is contrary to law, and therefore the principal is not liable, if the surety pays the debt he cannot recover from the principal.⁸⁶ But where the surety has been compelled to pay the debt of his principal, without any fraud or negligence on his part, though the obligation is without consideration, he can recover.⁸⁷ If he pays a debt barred by the statute of limitations, then he cannot recover from the principal,⁸⁸ because the princi-

⁸¹ *Thompkins v. Hunter*, 149 N. Y. 117; *Dodge v. McKechnie*, 156 N. Y. 514.

⁸² *Sponhaur v. Malloy*, 21 Ind. App. 287.

⁸³ *Bancroft v. Abbott*, 3 Allen, 524.

⁸⁴ *Russell v. Failor*, 1 Ohio St. 327; *Noble v. Blount*, 77 Mo. 235.

⁸⁵ *McCrory v. Parks*, 18 Ohio St. 1.

⁸⁶ *Davis v. Stokes County*, 74 N. Car. 374.

⁸⁷ *Frith v. Sprague*, 14 Mass. 455.

⁸⁸ *Stone v. Hammell*, 83 Cal. 547; *Halshutt v. Pegram*, 21 La. Ann. 722; *Elliott v. Nichols*, 7 Gill (Md.), 85. See sec. 173.

pal is under no legal obligation to the creditor to pay the debt barred by the statute of limitations.⁸⁹

§ 191. VOLUNTARY PAYMENT BY SURETY.—A surety cannot recover money voluntarily paid by him for a principal, for the reason that a surety cannot pay a debt for which his principal is not liable, and then sue the principal for reimbursement.⁹⁰ When one is not legally bound to pay the debt of another, if he pays it, he is a mere volunteer and cannot, therefore, claim reimbursement from the debtor.⁹¹ The party in paying the creditor must act under compulsion to save himself from loss, in order to demand reimbursement.⁹²

So the promise to pay the pre-existing debt of another person to his creditor, requires a new consideration to support it, and if this new consideration is not given, the creditor cannot enforce it against the promisor, or surety. Thus, where a widow gives a note for a pre-existing debt of her deceased husband, whose estate is insolvent, she is, in many States, only a surety, and cannot be compelled to pay the debt, or note.⁹³ And she cannot be considered liable on the new contract, whether she be considered a surety or a mere volunteer.⁹⁴

§ 192. STATUTE OF LIMITATIONS AS BETWEEN SURETY AND PRINCIPAL.—The statute of limitations may run in favor of the principal so as to bar the surety from recovering from the principal. The statute begins to run, in favor of the principal, from the time when the surety has paid the principal's debt. There is an implied promise on the part of the principal to indemnify the surety and repay him all money that he may be compelled to pay to the creditor, in consequence of his liability as surety; and until the surety makes payment, there is no breach

⁸⁹ Elder v. Elder, 43 Kan. 514.

⁹⁰ Opp v. Ward, 125 Ind. 241.

⁹¹ Beaver v. Slanker, 94 Ill. 175.

⁹² Aetna L. Ins. Co. v. Middleport, 124 U. S. 534; Hoover v. Epler, 52 Pa. St. 522.

⁹³ Parsons v. Nield, 137 Pa. St. 385; Hetherington v. Hixon, 46 Ala. 297; Sponhaur v. Malloy, 21 Ind. App. 287.

⁹⁴ Williams v. Nichols, 10 Gray, 83.

of this implied promise, and hence no cause of action against the principal for such payment arises until the payment is made.⁹⁵ And so the statute begins to run in favor of the principal at the time the property of the surety is sold to pay the debt.⁹⁶

Where the surety has paid a part, and thereafter the principal pays the balance, the statute begins to run from the time of the principal's payment, and not from the partial payment by the surety, because until the last payment by the principal, it could not be ascertained how much the surety would be obliged to pay.⁹⁷

In some States this matter is controlled by statute. Thus, in Missouri, if the surety pays his principal's debt, he must present his claim for reimbursement to the Probate Court, in case of the death of the principal, within the time limited by statute, or lose his right to recover.⁹⁸ In Illinois, where the state of the decedent's estate is sufficient to pay all claims, a failure of the holder of a note against the deceased principal to have it probated will release the surety as to the whole debt, and where the estate is sufficient to pay a part, then the surety is released *pro tanto*.⁹⁹ However, the claim is not barred, but a right to claim a distributive share out of the property inventoried is barred. The creditor still has the right to satisfy his claim out of subsequently discovered estate not inventoried.¹⁰⁰ And as the surety has the right to be subrogated to the rights of the creditor when he is compelled to pay the principal's debt, he would have no greater rights than the creditor in probating the claim.

The surety having paid the debt which the principal ought to have paid, the law implies a promise on the part of the principal to reimburse the surety, and the latter may maintain an action on the implied promise as for money paid for the use of the

⁹⁵ *Thayer v. Daniels*, 110 Mass. 345; *Williams v. Williams*, 5 Ohio, 444.

⁹⁶ *Wesley Church v. Moore*, 10 Pa. St. 273.

⁹⁷ *Davies v. Humphreys*, 6 Mees. & W. 153. Compare *Williams v. Williams*, 5 Ohio, 444.

⁹⁸ *Bauer v. Gray*, 18 Mo. App. 164.

⁹⁹ *Waughop v. Bartlett*, 165 Ill. 124.

¹⁰⁰ *Snyderacker v. Land Co.*, 154 Ill. 220.

principal.¹⁰¹ And the rule as to the running of the statute of limitations in bringing such case is the same that applies generally to other actions upon implied and unwritten contracts.¹⁰²

§ 193. RELIEF OF SURETY IN EQUITY.—Equitable relief in behalf of the surety is one of original jurisdiction in a court of chancery.¹⁰³ And though the liability of a surety is governed by the same principles at law as in equity, a court of equity will not send a party suing there to a court of law for a discharge or relief; but will extend the same relief and exercise the same powers in behalf of sureties that can be exercised by law.¹⁰⁴

After the debt is due equity will compel the creditor or obligee to satisfy his demands out of the estate of the principal debtor,¹⁰⁵ and, after the surety has paid the debt, set aside a fraudulent conveyance of the principal.¹⁰⁶

¹⁰¹ *Poe v. Dixon*, 60 Ohio St. 124.

¹⁰² *Sherrod v. Woodward*, 4 Dev. L. (N. Car.) 360; *Thayer v. Daniels*, 110 Mass. 345; *Poe v. Dixon*, 60 Ohio St. 124; *Zuellig v. Hemerlie*, 60 Ohio St. 27.

¹⁰³ *New York Bank Note Co. v. Kerr*, 77 Ill. App. 53.

¹⁰⁴ *Viele v. Hoag*, 24 Vt. 46; *Eyre v. Everett*, 3 Hare, 567.

¹⁰⁵ *Ardesco Oil Co. v. Oil Co.*, 66 Pa. St. 375; *Philadelphia, etc., R. R. Co. v. Little*, 41 N. J. Eq. 519; *Moore v. Topliff*, 107 Ill. 241; *Smith v. Harbin*, 124 Ind. 434; *McMillen v. Mason*, 71 Wis. 405.

¹⁰⁶ *Bragg v. Patterson*, 85 Va. 233; *Strong v. Taylor*, 79 Ind. 208; *Hatfield v. Merod*, 82 Ill. 113; *Choteau v. Jones*, 11 Ill. 300.

CHAPTER VIII.

RIGHTS OF CO-SURETIES.

§ 194. RIGHT TO CONTRIBUTION.—When one co-surety pays the debt after the principal has defaulted, he is entitled to contribution from the other co-sureties. The obligation of contribution is not founded upon contract, but on the principle of equity. This principle is accepted by all parties under circumstances when it can be applied, and upon this ground courts have also taken jurisdiction to enforce contribution.¹ The equity springs out of the proposition that where two or more sureties stand in the same relation to a principal, they are entitled equally to all the benefits and must bear equally all the burdens of the position. They must occupy the same position in respect to the principal, unless equities among themselves give an advantage to one over the others.²

And this liability to contribution exists although the sureties are ignorant of each other's engagement.³

The jurisdiction of all law courts is based upon the doctrine that the equitable principle has been so long and so generally acknowledged and enforced that persons, in placing themselves under circumstances to which contribution applies, may be sup-

¹ *Ellesmere Brewing Co. v. Cooper* (1896), 1 Q. B. 75; *Drummond v. Yager*, 10 Ill. App. 380; *Paul v. Kaighn*, 29 N. J. L. 480; *Robinson v. Boyd*, 60 Ohio St. 57; *Craythorne v. Swinburne*, 14 Ves. 169; *Paul v. Berry*, 78 Ill. 158; *Alderson v. Menes*, 16 Nev. 298; *McDonald v. McGruder*, 3 Pet. 470; *Nielson v. Fry*, 16 Ohio St. 552; *Patterson v. Patterson*, 23 Pa. St. 464; *Norton v. Coons*, 6 N. Y. 33.

² *Barry v. Ransom*, 2 N. Y. 462; *Ellesmere Brewing Co. v. Cooper* (1896), 1 Q. B. 75; *Wells v. Miller*, 66 N. Y. 255.

³ *Craythorne v. Swinburne*, 14 Ves. 160; *Robinson v. Boyd*, 60 Ohio St. 57; *Norton v. Coons*, 6 N. Y. 33; *Chaffee v. Jones*, 19 Pick. 260; *Durbin v. Kuney*, 19 Oreg. 74; *Stovall v. Bank*, 78 Va. 188; *Monson v. Drakeley*, 40 Conn. 552; *Warner v. Morrison*, 3 Allen, 566; *Whitehouse v. Hanson*, 42 N. H. 9; *Wells v. Miller*, 66 N. Y. 255.

posed to act under the dominion of contract implied from the universality of that principle.⁴

The obligation of co-sureties, though several, is not collateral. It is for the same thing. They have a right of indemnity against their principal, and there is generally such mutuality between them as to render the right a duty of contribution.⁵ But a voluntary payment of the debt by one of the sureties does not give the right of contribution.⁶ Thus, one of the sureties who pays a judgment against his principal which is not legally enforceable, cannot recover contribution.⁷ But where a surety pays a note in good faith, not knowing of a defense, he is entitled to contribution.⁸ If the surety is legally bound, and a demand is made by the creditor, and he pays without a suit, he can enforce contribution.⁹ And so a surety has a right to contribution, if he pays a judgment before execution is issued;¹⁰ or if the debt is due and collectible;¹¹ and so if suit is brought and he pays before trial;¹² and he may pay a legal debt in advance and then have contribution at maturity;¹³ also, if he pays an amount settled by arbitration.¹⁴ In Louisiana the surety must wait until judgment is rendered.¹⁵ If a note has been altered after the name of the surety paying it, this does not prevent him from recovering contribution, because he has a right to ratify the note after such alteration.¹⁶ And it is held that it

⁴ *Lansdale v. Cox*, 7 T. B. Mon. 401; *Pile v. McCay*, 99 Tenn. 367.

⁵ *Monson v. Drakeley*, 40 Conn. 552; *Covey v. Bostwick*, 20 Ohio St. 337.

⁶ *Curtis v. Parks*, 55 Cal. 106; *Skillin v. Merrill*, 16 Mass. 20; *Hadley v. Murray*, 112 Ala. 185.

⁷ *Smith v. Staples*, 40 Conn. 90.

⁸ *Warner v. Morrison*, 3 Allen, 566; *Hichbone v. Fletcher*, 66 Me. 209.

⁹ *Hondell v. Carroll*, 90 Wis. 350.

¹⁰ *Buckner v. Stewart*, 34 Ala. 529; *Briggs v. Hinton*, 14 Lea, 233; *Mason v. Pierson*, 69 Wis. 590.

¹¹ *Pitt v. Purssard*, 8 Mees & W. 538; *Warner v. Morrison*, 3 Allen, 566.

¹² *Machado v. Fernandez*, 74 Cal. 362.

¹³ *Craig v. Craig*, 5 Rawle, 98; *Galson v. Brand*, 75 Ill. 148; *Felton v. Bissel*, 25 Minn. 20.

¹⁴ *Burnell v. Minot*, 4 Moor, 340; 16 E. C. L. 375.

¹⁵ *Stockmeyer v. Oertling*, 35 La. Ann. 469.

¹⁶ *Houck v. Graham*, 106 Ind. 195. Compare *Davis v. Bauer*, 41 Ohio St. 257.

is no defense that the original note was void for want of consideration. If one of the sureties pays it he can obtain contribution.¹⁷

A judgment against one surety does not conclude his co-surety from showing there was no liability,¹⁸ unless he was party to the suit.¹⁹

A payment of a judgment of one co-surety is not an accord and satisfaction as to the actions,²⁰ and he can maintain, at once, an action against his co-sureties for contribution and without waiting to dispose of any indemnity that the principal has provided as security.²¹

Contribution originally was enforceable only in courts of equity, but now also in courts of law, which take jurisdiction on the ground of an implied promise on the part of each joint debtor or surety to contribute his share to make up the loss.²²

§ 195. PAYMENT BY NOTE.—One surety may make payment by his own negotiable note when the debt is due, and then compel contribution from the other co-sureties, though his own note is not yet due.²³ This is so because his negotiable note is equivalent to money; and as the maker will be liable to the indorser, he might be subject to a double liability unless the note should be deemed as payment of the debt for which it was given. And substituting a negotiable note is such a payment as will entitle the surety who gave it to maintain *indebitatus assumpsit* against the co-surety for contribution; because *indebitatus assumpsit* lies only upon a promise to pay money or its equivalent. But

¹⁷ Cane v. Burney, 6 Ala. 780.

¹⁸ Malin v. Bull, 13 Serg. & R. 441; Cathcart v. Foulke, 13 Mo. 561; Thomas v. Hubbell, 15 N. Y. 405.

¹⁹ Rice v. Rice, 14 B. Mon. 335; Konitzky v. Meyer, 49 N. Y. 571.

²⁰ Coffee v. Tevis, 17 Cal. 239; Williams v. Riehl (Cal.), 59 Pac. Rep. 162.

²¹ Johnson v. Vaughn, 65 Ill. 425; Paulin v. Kaighn, 29 N. J. L. 483; Bachelder v. Fiske, 17 Mass. 464.

²² Powers v. Nash, 37 Me. 322; Oldham v. Brown, 28 Ohio St. 41.

²³ Ralston v. Wood, 15 Ill. 171; Nixon v. Brand, 111 Ind. 137; Chandler v. Brainard, 14 Pick. 285; Smith v. Mason, 44 Neb. 610; Ryan v. Krusen, 76 Mo. App. 496; Wetherby v. Mann, 11 Johns. 518.

where one of several sureties has satisfied the debt without advancing any money or anything equivalent, the law does not imply any promise by a co-surety to pay money in contribution;²⁴ hence, payment by a bond or non-negotiable paper will not entitle the surety to contribution.²⁵

But in some jurisdictions payment made in any mode, either in property, negotiable paper, or securities, is sufficient, if such payment is received as a full satisfaction of the demand, and will be treated as cash, even if it be a bond,²⁶ because a bond is equivalent to coin.²⁷ And the payment is sufficient to compel contribution, though the maker becomes insolvent and never pays the note.²⁸ But if the creditor delivers the note to the maker as a gift before the surety tries to compel contribution, he has no equity to recover contribution against his co-sureties.²⁹

§ 196. ENFORCEMENT AT LAW.—At law, if one co-surety pays the whole debt, his right to contribution is complete. But he cannot sue two or more jointly, but he must sue each separately, and he can only recover from each an *aliquot* portion of the debt, to be ascertained by the number of sureties, without regard to their solvency.³⁰ Thus, where a co-surety has paid a note, he is entitled to contribution from each of his co-sureties in *aliquot* parts according to their number, with interest and other necessary expenses.³¹ But when the co-surety pays no attorney fees, he can not collect them *pro rata* from his co-sureties, because a

²⁴ Wetherby v. Mann, 11 Johns. 518.

²⁵ White v. Miller, 47 Ind. 385; Morrison v. Berkey, 7 Serg. & R. 238; Bouhward v. Robinson, 8 Tex. 32; Cummings v. Hockley, 8 Johns. 202; Barth v. Graf, 101 Wis. 27; Stone v. Farwell, 83 Cal. 547; Huse v. Ames, 104 Mo. 91; Peters v. Bayhill, 1 Hill (S. Car.), 237.

²⁶ Ralston v. Wood, 16 Ill. 169, 171; Robertson v. Maxcey, 6 Dana, 104.

²⁷ Cox v. Reed, 27 Ill. 434.

²⁸ Owen v. McGehee, 61 Ala. 440.

²⁹ Stebbins v. Mitchell, 82 Ky. 535.

³⁰ Sloo v. Pool, 15 Ill. 48; Moore v. Bruner, 31 Ill. App. 400; Fischer v. Gaither, 32 Oreg. 161; Cowell v. Edwards, 2 Bos. & P. 268; Morrison v. Poyntz, 7 Dana, 307.

³¹ Slothoff v. Dunham, 19 N. J. L. 181; Acers v. Curtis, 68 Tex. 423; Dodd v. Winn, 27 Mo. 504.

co-surety cannot speculate off his co-sureties.³² Where the employment of counsel is prudent and necessary, the surety who pays attorney fees under such circumstances is entitled to contribution, the same as another surety who pays the judgment or decree recovered against him.³³ So contribution may be enforced for necessary traveling expenses.³⁴

When a partnership is a co-surety, it is but a unit as to the question of contribution.³⁵

In some of the States contribution is given at law as well as in equity, according to the number of solvent sureties.³⁶ And so in those States where the distinction between law and equity has been abolished, the number of solvent sureties liable to contribution is the basis of apportionment.³⁷ And contribution is apportioned among solvent sureties by statute in some States.³⁸

§ 197. ENFORCEMENT IN EQUITY.—In equity, in a suit by a surety against his co-surety for contribution, only the solvent co-sureties are taken into account.³⁹ The surety can recover in equity a *pro rata* amount paid by taking into consideration the number of solvent sureties by excluding the insolvent ones.⁴⁰ And in considering the number of solvent co-sureties, the removal of a surety from the State is, for this purpose, equivalent to insolvency, and the non-resident co-surety will not be

³² *Acers v. Curtis*, 68 Tex. 423.

³³ *Fletcher v. Jackson*, 23 Vt. 581; *Gross v. Davis*, 87 Tenn. 226; *Davis v. Emerson*, 17 Me. 64.

³⁴ *Preston v. Campbell*, 3 Haywood (Tenn.), 20.

³⁵ *Chaffee v. Jones*, 19 Pick. 260.

³⁶ *Michael v. Allbright*, 126 Ind. 172; *Currier v. Baker*, 51 N. H. 613; *Mills v. Hyde*, 19 Vt. 59; *Liddell v. Wiswell*, 59 Vt. 365; *Harris v. Ferguson*, 2 Bailey (S. Car.), L. 397.

³⁷ *Stewart v. Goulden*, 52 Mich. 143; *Smith v. Mason*, 44 Neb. 610; *Roberts v. Trigg*, 32 Gratt. 26; *Security Ins. Co. v. Ins. Co.*, 50 Conn. 233; *Scott v. Bryan*, 96 N. Car. 289.

³⁸ *Couch v. Terry*, 12 Ala. 227; *Van Petten v. Richardson*, 68 Mo. 382; *Faurot v. Gates*, 86 Wis. 569; *Dodd v. Winn*, 27 Mo. 504; *Magruder v. Admire*, 4 Mo. App. 133.

³⁹ *Gross v. Davis*, 87 Tenn. 226.

⁴⁰ *Osterly v. Barber*, 66 N. Y. 433; *Braman v. Blanchard*, 4 Wend. 435; *Preston v. Preston*, 4 Gratt. 88.

counted;⁴¹ and so an insolvent co-surety need not be made a party to the suit.⁴² At law, while there is a conflict of authority upon the subject, the weight of authority seems to be that insolvency of the principal debtor need not be averred in order to establish the right of contribution; because this right is founded upon the implied promise of each surety to pay an *aliquot* part of the debt in case of the principal's default. And as the action against each is separate and dependent upon an enforcement of the strict letter of the implied *assumpsit*, the default, and not the insolvency of the principal, is the ingredient that renders the remedy effectual. But equity, to prevent a multiplicity of suits and avoid a circuitry of remedies, will compel the surety who has paid the debt to recover the same from the principal if he is solvent, on the theory that his co-surety, in equity, may be compelled to contribute in excess of his implied agreement; so in that forum he cannot be compelled to respond, at all, if the principal is solvent; hence the necessity of alleging the insolvency of the principal as a condition precedent to the right of contribution in equity. Many decisions, though not all, support this doctrine, and hold that it is incumbent upon the plaintiff in a suit in equity to allege the insolvency of the principal as a condition precedent to the enforcement of contribution of co-sureties.⁴³

§ 198. THE CO-SURETY CANNOT SPECULATE TO THE INJURY OF HIS CO-SURETIES.—The surety paying cannot speculate and thereby derive benefits not shared by his co-sureties. Thus, if a co-surety purchased the note of the principal for less than its face value, his co-sureties are entitled to share in the benefits of

⁴¹ Boardman v. Paige, 11 N. H. 431; Liddell v. Wiswell, 59 Vt. 365; McKenna v. George, 2 Rich. Eq. (S. Car.) 15; Faurot v. Gates, 86 Wis. 569; Acers v. Curtis, 68 Tex. 423; Security Ins. Co. v. Ins. Co., 50 Conn. 233; Bosley v. Taylor, 5 Dana, 159.

⁴² Johnson v. Vaughn, 65 Ill. 425; Ellesmere Brewing Co. v. Cooper (1896), 1 Q. B. 75.

⁴³ Gross v. Davis, 87 Tenn. 226; 10 Am. St. Rep. 637; Morrison v. Poyntz, 7 Dana, 307; Fischer v. Gaither, 32 Oreg. 161.

the bargain.⁴⁴ So if a surety pays less than the whole debt, he can recover only the *pro rata* share from the other sureties, of the amount he paid.⁴⁵ In order to recover of the co-sureties, he must pay in excess of his share of the debt.⁴⁶ If he pays the debt in property, the value of the property is the basis upon which contribution can be enforced.⁴⁷

When a surety has bought the claim of his principal at a discount, he cannot compel his co-sureties to contribute more than their just proportion of the sum paid; otherwise the co-sureties would stand in a worse position than the principal;⁴⁸ that is, he can recover only the proportionate amount of the sum paid by him when it is in excess of his share of payment.⁴⁹

§ 199. SURETY OF A SURETY.—A surety of a surety is not liable to contribution to a debt of a co-surety of the principal.⁵⁰ Thus, where a party signs a note as security for one who is himself only a surety for the principal maker, he is not liable in a suit for contribution by the one for whom he signed as surety.⁵¹

§ 200. OBLIGATION TO CONTRIBUTE.—At law the obligation to contribute is a several, and not a joint, obligation.⁵² So a

⁴⁴ *Acers v. Curtis*, 68 Tex. 423.

⁴⁵ *Lowell v. Edwards*, 2 Bos. & P. 268; *Browne v. Lee*, 6 Barn. & C. 689; *Morgan v. Smith*, 70 N. Y. 537; *Bryan v. McDonald*, 15 Lea, 581; *Gourdin v. Trenholm*, 25 S. Car. 362.

⁴⁶ *Fletcher v. Grover*, 11 N. H. 368.

⁴⁷ *Jones v. Bradford*, 25 Ind. 305; *Hickman v. McCurdy*, 7 J. J. Marsh, 555.

⁴⁸ *Mason v. Lord*, 20 Pick. 447; *Currier v. Fellows*, 27 N. H. 366; *Sinclair v. Redington*, 56 N. H. 146; *Fuselier v. Babeneau*, 14 La. Ann. 777.

⁴⁹ *Tarr v. Ravenscroft*, 12 Gratt. 642; *Kelly v. Page*, 7 Gray, 213; *Owen v. McGehee*, 61 Ala. 440; *In re Arcedeckna*, 24 Ch. Div. 709; *Edmonds v. Sheahan*, 47 Tex. 443.

⁵⁰ *Knox v. Vallandigham*, 13 Smed. & M. (Miss.) 520; *Tom v. Goodrich*, 2 Johns. 214; *Adams v. Flanagan*, 36 Vt. 400; *Baldwin v. Fleming*, 90 Ind. 177. Compare *Stout v. Vause*, 1 Rob. (Va.) 179.

⁵¹ *Robertson v. Deatharge*, 82 Ill. 511; *McCollum v. Broughton*, 132 Mo. 601.

⁵² *Adams v. Hayes*, 120 N. Car. 383; *Graves v. Smith*, 4 Tex. Civ. App. 537; *Johnson v. Harvey*, 84 N. Y. 363.

co-surety who is a non-resident, is not a necessary party defendant to an action for contribution, as the liability of co-sureties to each other is not joint, but several.⁵³ At law, he can only recover from each co-surety severally an *aliquot* proportion of the debt, ascertained by the whole number of co-sureties.⁵⁴ And at law he may recover under the common counts the amount due by way of contribution from each co-surety.⁵⁵ And he may, recover necessary attorney fees and other expenses in litigation with the principal.⁵⁶

§ 201. LIABILITY OF SURETY'S ESTATE.—One surety who has paid the debt is entitled to be subrogated to all the rights and remedies of the creditor as against his co-surety in precisely the same manner as against the principal debtor. Hence, he can have contribution from the estate of a co-surety who is dead.⁵⁷ And this right to contribution may be had against the heirs of the co-surety, after the discharge of the administrator.⁵⁸ And the distributees must contribute in proportion to what they have received.⁵⁹ It is the general rule that the estate of a deceased co-surety is liable to contribution, whether he died before or after the liability arises.⁶⁰

§ 202. REMEDY AGAINST CO-SURETY BEFORE PAYMENT.—A co-surety, before he pays the debt, may maintain a suit in

⁵³ Voss v. Lewis, 126 Ind. 155.

⁵⁴ Sloo v. Pool, 15 Ill. 47; Moore v. Bruner, 31 Ill. App. 400; Porter v. Horton, 80 Ill. App. 333; Odlin v. Greenleaf, 3 N. H. 270; Harvey v. Drew, 82 Ill. 606.

⁵⁵ Porter v. Horton, 80 Ill. App. 333; Powell v. Edwards, 2 Bos. & P. 267.

⁵⁶ Gross v. Davis, 87 Tenn. 226; Fletcher v. Jackson, 23 Vt. 581; Davis v. Emerson, 17 Me. 64.

⁵⁷ Pace v. Pace, 95 Va. 792; Conover v. Hill, 76 Ill. 342; Sanders v. Weelburg, 107 Ind. 266; Johnson v. Harvey, 84 N. Y. 363; Lidderdale v. Robinson, 12 Wheat. 594; Malin v. Bull, 13 Serg. & R. 441; Fletcher v. Jackson, 23 Vt. 56; Handley v. Heflin, 84 Ala. 600.

⁵⁸ Gibson v. Mitchell, 16 Fla. 519; Stevens v. Tucker, 87 Ind. 109; Zollickoffer v. Seth, 44 Md. 359.

⁵⁹ Zollickoffer v. Seth, 44 Md. 359. Compare Primrose v. Bromley, 1 Atk. 90; Waters v. Riley, 2 Har. & G. (Md.) 305.

⁶⁰ Vliet v. Wyckoff, 42 N. J. Eq. 642.

equity compelling contribution, after the debt is due and unpaid. Thus, a surety against whom a judgment has been obtained by the creditor for the full amount of the debt secured, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability.⁶¹ Before the payment of the debt which is due, any one of several co-sureties may maintain a suit in equity against his co-surety to contribute to the payment of the debt if the principal is unable to pay it.⁶²

And so a surety may bring suit in equity against a co-surety for contribution, when the latter is about to make a fraudulent disposition of his property so as to escape liability in payment of the principal's debt, who is insolvent.⁶³ But when the surety is primarily liable to pay the debt, his action at law or in equity cannot be maintained until he has paid the amount. Until he has paid, there is neither an equitable obligation or an implied contract to make such contribution.⁶⁴

§ 203. CO-SURETIES UNDER DIFFERENT INSTRUMENTS.—It is well settled that parties may be co-sureties under different instruments, at different times, and without the knowledge of each other, provided that the obligations into which they enter are for the same engagement and for the same principal. It is sufficient for the right to claim contribution that it appears that the parties are under obligation to pay the same debt as sureties for a third person.⁶⁵ And this rule applies to sureties on successive bonds. Thus, where sureties on an executor's bond are discharged and new sureties taken, the two sets of sureties be-

⁶¹ Walmerhausen v. Gullick (1893), 2 Ch. 514.

⁶² Morrison v. Poyntz, 7 Dana, 307; Hodgson v. Baldwin, 65 Ill. 532; Hyde v. Tracy, 2 Day (Conn.), 492.

⁶³ Bowen v. Haskins, 45 Miss. 183; Smith v. Rumsey, 33 Mich. 183.

⁶⁴ Covey v. Bostwick, 20 Ohio St. 337; Gross v. Davis, 87 Tenn. 226; Bushnell v. Bushnell, 77 Wis. 435; Gordon v. Rixey, 86 Va. 853; Mason v. Lord, 20 Pick. 447; Weidmeyer v. Landon, 66 Mo. App. 520; Morgan v. Smith, 70 N. Y. 542; Glasscock v. Hamilton, 62 Tex. 166.

⁶⁵ Golsen v. Brand, 75 Ill. 148; Craythorne v. Swinburne, 14 Ves. 164; In re Ennis (1893), 3 Ch. 238; Warner v. Morrison, 3 Allen, 566; Young v. Shunk, 30 Minn. 503; Aspinwall v. Sacchi, 57 N. Y. 331.

come jointly liable for breach of the bond which occurred before the discharge, and the right of contribution exists as between co-sureties.⁶⁶ And two persons are co-sureties when one is on a general official bond and the other on a special bond required under the same obligation with relation to a special debt.⁶⁷

§ 204. THE OBLIGATION MUST BE THE SAME.—If the obligation of the different sureties are for wholly different things, or have no relation to each other, though they arise out of the same original indebtedness, then there is no right of contribution among the several sureties.⁶⁸ So where one of the sureties and the principal execute a new note, which takes the place of the old note, the surety upon such new note will not be entitled to contribution from the other sureties upon the old note for which the new note was executed.⁶⁹

§ 205. CO-SURETIES LIMITING THEIR LIABILITY IN DIFFERENT AMOUNTS.—Co-sureties may limit their liability. So where two or more persons bind themselves as sureties for a common principal and in different amounts, in case of contribution, they are liable in proportion to the limitation of their respective liability, and not in equal amounts. Where the claim of the creditor is to the full amount, each must pay up to the fixed limit of his liability; but where the claim is less than such full amount, and is discharged by one, the claims must be proportionately borne by the others, even where the claim does not exceed the fixed limit of the liability of the surety who has paid.⁷⁰ Where the same default of the principal renders all the co-sureties responsible, they must contribute equally if each is

⁶⁶ Scofield v. Churchill, 72 N. Y. 565; Choate v. Arrington, 116 Mass. 552; Pinkstaff v. State, 59 Ill. 148; State v. Berring, 74 Mo. 87; Commonwealth v. Cox, 36 Pa. St. 442.

⁶⁷ Elbert v. Jacoby, 8 Bush, 547; Cherry v. Wilson, 78 N. Car. 164.

⁶⁸ Kellar v. Williams, 10 Bush, 216; Rosenbaum v. Goodman, 76 Va. 121; Salyers v. Ross, 15 Ind. 130.

⁶⁹ Bell v. Boyd, 76 Tex. 133; Tittle v. Schmitt, 94 Ga. 405. See, also, Chapman v. Garber, 46 Neb. 16.

⁷⁰ Ellesmere Brewing Co. v. Cooper (1896), 1 Q. B. 75.

a surety to an equal amount; but if not equal, then proportionately to the amount for which each is a surety.⁷¹

Sureties for the same principal and for the same engagement, even although bound by different instruments and for different amounts, have a common interest and a common burden; so if one surety who is directly liable to the creditor pays such creditor, he can claim contribution from his co-sureties, whose obligations to the creditor he has discharged. Where sureties are bound jointly and severally, but limit their liability, the liability can only be enforced against each surety to the limit of the liability fixed in the instrument; and when one has paid to the limit of his liability, there can be no contribution exacted from him. And if the circumstances are such that he discharges the obligation for less than his individual limit, yet he can compel contribution from the other co-sureties.⁷²

§ 206. ACCOMMODATION INDORSERS.—Some courts hold that, in the absence of agreement, the legal liability of the parties to a promissory note is to be determined by the relation they bear to such note; and the fact that one of them is the principal debtor, and the others sign for his accommodation, will not change this note or make the whole number signing co-sureties as to each other.⁷³ Thus, where one of two accommodation signers executes a note as joint maker with the principal debtor, and the other as payee and indorser, and there is no special agreement between them, they are not co-sureties.⁷⁴ However, this is not the law in other jurisdictions, and accommodation indorsers are considered as co-sureties and liable to contribution. Thus, where successive indorsers, by indorsing as an accommo-

⁷¹ *Pendlebury v. Walker*, 4 Y. & C. (Exch.) 424; *Steel v. Dixon*, 17 Ch. D. 825; *In re Arcedeckne*, 24 Ch. D. 709.

⁷² *Ellesmere Brewing Co. v. Cooper* (1896), 1 Q. B. 75.

⁷³ *McCarty v. Roots*, 21 How. 432; *McDonald v. Magruder*, 3 Pet. 476; *Armstrong v. Harsham*, 61 Ind. 52; *McGurk v. Huggett*, 50 Mich. 187; *Hogue v. Davis*, 8 Gratt. 4; *Sherrod v. Rhodes*, 5 Ala. 683; *Kershaw v. Conklin*, 40 Conn. 81; *Aiken v. Barkley*, 2 Spear (S. Car.), 747.

⁷⁴ *Hillegas v. Stephenson*, 75 Mo. 118; *Wilson v. Stanton*, 6 Blackf. (Ind.) 507.

dation of maker of the note, though at different times and without mutual agreement, they are held as co-sureties, and in equity will be liable to contribution.⁷⁵

§ 207. SURETY IN LEGAL PROCEEDINGS.—Where a party becomes a surety in the course of legal proceedings to collect a debt from the principal debtor, he is not a co-surety with the original surety for the debt when contracted, and is not liable to contribution to the original surety; neither is he liable to the other.⁷⁶ If the original surety pays the debt he will be substituted in the place of the creditor or obligee to the exclusion of the surety in the legal proceedings.⁷⁷

§ 208. INDEMNITY TO ONE SURETY.—The indemnity to one surety inures to the benefit of the others.⁷⁸ The right of the co-surety to share in the indemnity given to another surety, results not from contract or intention of the principal and surety, but from the principles of equity arising out of the relation which the sureties bear to each other.⁷⁹ If the indemnity fails without any neglect of the party indemnified, then there is no right of contribution.⁸⁰ If the surety has released or wasted the security given him by the principal, he loses his right to contribution to the extent of his indemnity,⁸¹ and *pro rata* if he

⁷⁵ *Stovall v. Bank*, 78 Va. 188; *Dillenback v. Dygert*, 97 N. Y. 303; *Daniel v. McRae*, 2 Hawks (N. Car.), 590; *Freeman v. Cherry*, 46 Ga. 14; *Atwater v. Farthing*, 118 N. Car. 388. See sec. 14.

⁷⁶ *Chaffin v. Campbell*, 4 Sneed (Tenn.), 184; *Rosenbaum v. Goodman*, 78 Va. 121; *Dunlop v. Foster*, 7 Ala. 734; *Smith v. Berry*, 3 Ohio, 33; *Pott v. Nathans*, 1 Watts & R. 155; *John v. Jones*, 16 Ala. 454; *Preston v. Preston*, 4 Gratt. 88; *Langford v. Perrin*, 5 Leigh, 552.

⁷⁷ *Pott v. Nathans*, 1 Watts & S. 155; *Schmitzel's Appeal*, 49 Pa. St. 23; *Wolf v. Stover*, 107 Pa. St. 206.

⁷⁸ *Steele v. Mealing*, 24 Ala. 285; *Farmers' Nat. Bank v. Snodgrass*, 29 Oreg. 395; *Berridge v. Berridge*, 44 Ch. Div. 168; *Silvey v. Dowell*, 53 Ill. 260; *Kalso v. Kelso*, 16 Ind. App. 615; *Rambrant v. Johnson*, 62 Iowa, 155; *Moorman v. Hudson*, 125 Ind. 504.

⁷⁹ *Scribner v. Adams*, 73 Me. 541.

⁸⁰ *Conley v. Buck*, 100 Ga. 187.

⁸¹ *Frink v. Peabody*, 26 Ill. App. 390; *Sanders v. Weelburg*, 107 Ind. 272; *Chilton v. Chapman*, 13 Mo. 470.

has wasted a part of the indemnity.⁸² And the surety indemnified must account to those who pay the debt.⁸³ If there are several demands, with different co-sureties, indemnity given to one who is liable on all should be proportioned among them.⁸⁴ If the co-surety applies an indemnity bond to the payment of the debt, he acquires no right thereby to a contribution against a co-surety.⁸⁵ It does not prevent contribution because one surety takes property in trust from the principal, to be applied on the debt.⁸⁶

§ 209. LIABILITY TO CONTRIBUTE ON SUCCESSIVE BONDS.—The giving of subsequent bonds with the same penalties for the performance of the obligor's duties, makes them cumulative securities, and the liability of the sureties thereon for contribution is as if all had signed the same bond;⁸⁷ that is, the obligation of the sureties, as between themselves, is as if they were all bound by the same instrument.⁸⁸ But such sureties will not be liable to contribute, with a surety on another bond, to the payment of an amount charged against an executor, or obligor, for interest on money of the estate loaned to the latter surety.⁸⁹

§ 210. ADMISSIBILITY OF PAROL EVIDENCE TO SHOW THAT PARTIES ON A PROMISSORY NOTE ARE CO-SURETIES.—The great weight of authority is that parol evidence is admissible to show the true terms subsisting between the makers of a promissory

⁸² *Ramsey v. Lewis*, 30 Barb. 203; *Goodloe v. Clay*, 6 B. Mon. 230.

⁸³ *Whiteman v. Harriman*, 85 Ind. 49; *Hoover v. Mowser*, 84 Iowa, 43.

⁸⁴ *Mueller v. Barge*, 54 Minn. 314; *Barge v. Van Der Horck*, 57 Minn. 497; *Brown v. Ray*, 18 N. H. 102.

⁸⁵ *Gibson v. Shehan*, 5 App. Dist. Col. 391.

⁸⁶ *Roeder v. Niedermeier*, 112 Mich. 608.

⁸⁷ *Thompson v. Dekum*, 32 Oreg. 506.

⁸⁸ *Deering v. Winchelsea*, 2 Bos. & P. 270; 1 Cox, 310; *Odom v. Owen*, 2 Baxt. 446; *Pickens v. Miller*, 83 N. Car. 543; *Cobb v. Haynes*, 8 B. Mon. 137; *Armitage v. Pulmer*, 37 N. Y. 494; *Loring v. Bacon*, 3 Cush. 465; *Brooks v. Whitman*, 142 Mass. 399; *Stevens v. Tucker*, 87 Ind. 109; *Bosley v. Tayler*, 5 Dana, 157.

⁸⁹ *Crisfield v. Murdock*, 127 N. Y. 315; *Eshleman v. Bolenires*, 144 Pa. St. 269; *Thompson v. Dekum*, 32 Oreg. 506. See sec. 9, 168.

note when contribution is sought; and this is so whether their subscription appears to be that of principals or sureties. The reason upon which the rule is founded is that the note is the measure of the contract between the makers and the payee, and not between the makers themselves; and that their correlative and interdependent relations is a matter wholly collateral to the primary undertaking, so that parol evidence establishing such relation does not vary the terms of the instrument, or written contract.⁹⁰ So parol evidence is competent to show the relations existing between makers and guarantors or indorsers, who are bound by different, distinct and independent contracts. Such evidence in this class of cases is to prove a separate contract which was made by parol, and is of as high a character as the law requires in such cases.⁹¹ And so the relations between the parties can be shown by parol to be that of co-sureties, even if the plaintiffs had been promisors and the defendant's estate as indorser.⁹² And so a contract of indorsement is one implied by the law from the blank indorsement, and can be qualified by express proof of a contract between the parties, and is not subject to the rule that excludes proof to alter or vary the terms of an express agreement.⁹³ As touching irregular indorsements, as between the maker or indorsee and indorser, or a surety and indorser, or as between successive indorsers, the presumption which the face of the transaction imports may, as between accommodation parties to the paper, be rebutted, and their true relations shown to be that of co-sureties.⁹⁴

In the absence of agreement to the contrary, the parties to

⁹⁰ *Williams v. Glenn*, 92 N. Car. 253; *Stovall v. Adair* (Okl.), 60 Pac. Rep. 282; *Mansfield v. Edwards*, 136 Mass. 15; *Water Power Co. v. Brown*, 23 Kan. 676; *Bank v. Layne*, 101 Tenn. 45; *Barry v. Rawson*, 12 N. Y. 462; *Montgomery v. Page*, 29 Oreg. 320.

⁹¹ *Phillips v. Preston*, 5 How. 277; *Weston v. Chamberlin*, 7 Cush. 404.

⁹² *Clapp v. Rice*, 13 Gray, 406.

⁹³ *Ross v. Espy*, 66 Pa. St. 481; *Dunn v. Wade*, 23 Mo. 207; *McCune v. Belt*, 45 Mo. 174. See, also, *Sturtevant v. Randall*, 53 Me. 149; *Denton v. Lytle*, 4 Bush, 597; *Edelon v. White*, 6 Bush, 408; *Narre v. Chittenden*, 56 Ind. 462; *Easterly v. Barber*, 66 N. Y. 433. Compare *Johnson v. Ramsey*, 43 N. J. L. 280.

⁹⁴ *Wade v. Creighton*, 25 Oreg. 455; *McNeilly v. Patchin*, 23 Mo. 43.

a promissory note are liable on it according to the legal effect of the indorsements; that is, the maker is liable to the payee and the indorsers, and the payee to the indorsers which indorse to the subsequent indorsee. It may be proved by parol evidence that the relations of the parties to each other is different from this rule; that is, that the payee or indorsee was the real principal, or that all the parties were joint principals, or some of them joint sureties.⁹⁵ There must have been at the time of entering into such relations a contract between the accommodation parties, either expressed or implied, to become co-sureties and to share in the loss which might result from the obligations assumed, as without it the law fixes their engagement, and the mere fact that they have become parties for accommodation cannot change the result.⁹⁶ So parol evidence is admissible to show that one who, before delivery, for the accommodation of the maker of a promissory note, guaranteed the payment thereof by indorsement—is by a separate verbal agreement a co-surety with one who signed upon the face thereof as joint and several maker, and who was really a co-surety;⁹⁷ and so one may show by parol evidence that he is a surety, and not a co-surety for a party.⁹⁸

§ 211. STATUTE OF LIMITATIONS.—The statute of limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained; that is, until the claim of the principal creditor has been established against him by payment or otherwise; although at the time of the action for contribution, the statute may have run, as between the principal creditor and the co-surety.⁹⁹

⁹⁵ Sweet v. McAlister, 4 Allen, 354; Clapp v. Rice, 13 Gray, 406.

⁹⁶ McDonald v. Magruder, 3 Pet. 476; McCarty v. Roots, 21 How. 437; McCune v. Belt, 45 Mo. 178; Stillwell v. How, 46 Mo. 589; Kirschman v. Conklin, 40 Conn. 81; Hogue v. Davis, 8 Gratt. 4.

⁹⁷ Montgomery v. Page, 29 Oreg. 320.

⁹⁸ Leeper v. Paschal, 70 Mo. App. 37. See sec. 58.

⁹⁹ Wolmershausen v. Gullick (1893), 2 Ch. 514; Martin v. Frantz, 127 Pa. St. 389; Buell v. Burlingame, 11 Colo. 164; May v. Vann, 15 Fla. 553; Sexton v. Sexton, 35 Ind. 88; Hooper v. Hooper, 81 Md. 155, 174; Davies v. Humphreys, 6 Mees. & W. 153; Ex parte Snowden, 17 Ch. Div. 44; Durbin v. Kuney, 19 Oreg. 75; Leak v. Covington, 99 N. Car. 559.

This right of contribution does not arise from contract on the original instrument of joint obligation, but from the equity of one who has paid more than his just share of a joint debt.¹⁰⁰

On payment by a surety in excess of his proportion of the joint debt, he has a right of action for contribution, and the statute of limitation begins to run from the date of such payment; if payments be by installments, then from the date of the several payments.¹⁰¹

§ 212. **BANKRUPTCY OF CO-SURETY.**—In England and in several of the States, a discharge of a surety in bankruptcy does not release him from liability to contribution to his co-surety.¹⁰² While a discharge in bankruptcy is a bar to liability of a surety for his principal's debt, it is not to the equitable liability between co-sureties in an action for contribution when the payment was made subsequent to the discharge.¹⁰³ But in other States the discharge of a surety in bankruptcy discharges him as to his liability as to contribution to a co-surety.¹⁰⁴

¹⁰⁰ *Camp v. Bostwick*, 20 Ohio St. 337.

¹⁰¹ *Bushnell v. Bushnell*, 77 Wis. 435; *Bullock v. Campbell*, 9 Gill (Md.), 182; *Wilson v. Crawford*, 47 Iowa, 469; *Preston v. Gould*, 64 Iowa, 44; *McClatchie v. Durham*, 44 Mich. 435; *Williams v. Rees*, 15 Ohio, 572; *Wood v. Leland*, 1 Met. 387.

¹⁰² *Ryers v. Alcorn*, 6 Ill. App. 39.

¹⁰³ *Liddell v. Wiswell*, 59 Vt. 365; *Goss v. Gibson*, 8 Humph. 197; *Kerr v. Clark*, 11 Humph. 77; *Clements v. Langley*, 2 Nev. & M. 269.

¹⁰⁴ *Tobias v. Rogers*, 13 N. Y. 59; *Hibernian Bank v. Lacombe*, 84 N. Y. 368; *Miller v. Gillespie*, 59 Mo. 220; *Hilleburton v. Carter*, 55 Mo. 435; *Hays v. Ford*, 55 Ind. 52.

CHAPTER IX.

SURETIES ON BONDS IN LEGAL PROCEEDINGS.

§ 213. DISCHARGE OF SURETY ON DISSOLUTION OF ATTACHMENT.—An attachment is a mere creation of the statute, and its existence and operation in any case continues no longer than the statute provides it may.¹⁰⁵ Attachment bonds which substantially comply with the requirements of the statute which authorize them, will be upheld as valid, unless any other form than that prescribed is actually prohibited. A mere informality will not vitiate them, and will be upheld as a common law obligation.¹⁰⁶

It is the general rule that any voluntary obligation or agreement, entered into for a valuable consideration by parties capable of contracting, is valid at common law, unless it is repugnant to the statute or contravenes the policy of the law.¹⁰⁷

§ 214. EXONERATION OF SURETIES ON ATTACHMENT BONDS.—Where an attachment has been made upon property which has been returned to the debtor by his giving a delivery bond, the delivery bond cannot be satisfied only by actual delivery of the property. An offer to deliver can only be executed by bringing forward the property, identifying it and tendering it to the proper officer.¹⁰⁸ Telling the officer where the property is and to go and take it is not sufficient, and the sureties will not be released.¹⁰⁹ But an officer may waive delivery.¹¹⁰

¹⁰⁵ *Hamilton v. Bell*, 123 Cal 93.

¹⁰⁶ *Purcell v. Steele*, 12 Ill 93; *Allerton v. Eldridge*, 56 Iowa, 709; *Endress v. Ent*, 18 Kan. 236; *Wight v. Keyes*, 103 Pa. St. 567.

¹⁰⁷ *United States v. Linn*, 15 Pet. 290; *Pritchett v. People*, 1 Gil. (Ill.) 525; *Mosher v. Murphy*, 121 Mass. 276.

¹⁰⁸ *Pogue v. Joyner*, 7 Ark. 462.

¹⁰⁹ *Chapline v. Robertson*, 44 Ark. 202.

¹¹⁰ *Hansford v. Perrin*, 6 B. Mon. 595.

Where suit is brought against two principals, the discontinuance as to one will not have the effect to discharge a bond which the obligors have jointly given to dissolve an attachment. Nor is the surety released. If he had desired to escape liability for a judgment against only one of the obligors, he should have given a bond limited to a judgment against all.¹¹¹

§ 215. JUDGMENT OF NON-SUIT.—An attachment is dissolved upon the recovery of a judgment of non-suit entered in favor of the obligors, whose property has been attached, and the sureties on the bond given for the release of the attached property for a redelivery thereof to the officer, are thereupon discharged, and their liability is not revived or affected by a reversal of the judgment of non-suit subsequently rendered and judgment for the obligee.¹¹² Where an attachment is dissolved, all the proceedings are quashed and become of no effect, and the delivery bond falls, with the writ of which it is the basis.¹¹³

§ 216. ATTACHMENT LIEN BEING DISCHARGED—INSOLVENCY OF DEBTOR.—When a redelivery bond is given and the officer restores the property to the debtor, the lien is released. So if there is no attachment in force, the lien being discharged, and the debtor goes into bankruptcy or insolvency, this does not release the sureties on the delivery bond; their liability is not affected by the subsequent insolvency of their principal;¹¹⁴ and the sureties' liability is not changed by a subsequent discharge of the principal debtor in bankruptcy.¹¹⁵

§ 217. INCREASE OF CLAIM BY AMENDMENT OF DECLARATION.—In some of the States peculiar systems of jurisprudence with respect to suits in attachment, have grown up, and every-

¹¹¹ *Poole v. Dyer*, 123 Mass. 363; *Dalton v. Barnard*, 150 Mass. 473. Compare *Andre v. Fitzhugh*, 18 Mich. 93.

¹¹² *Hamilton v. Bell*, 123 Cal. 93.

¹¹³ *Gass v. Williams*, 46 Ind. 253; *Fernan v. Butcher*, 113 Pa. St. 292.

¹¹⁴ *McComb v. Allen*, 82 N. Y. 114; *Easton v. Ormsby*, 18 R. I. 309; *Rosenthal v. Perkins*, 123 Cal. 240.

¹¹⁵ *Bernheimer v. Charak*, 170 Mass. 179; *Gass v. Smith*, 6 Gray, 112.

thing in that connection is held to be *stricti juris*; in other States, a more liberal rule prevails. So where the liberal rule is followed, and no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in other actions.¹¹⁶

Thus, introducing additional items of indebtedness is conclusive as to the identity of the action, and the surety must be considered to have agreed to be liable for any judgment which might be rendered in the attachment proceedings.¹¹⁷

But where the rule of attachment is held to be *stricti juris*, any amendment introducing new matter will discharge the surety. Whenever the amendment lets in some new demand or new cause of action the sureties are discharged.¹¹⁸ But a mere formal defect will not discharge the surety, if corrected,¹¹⁹ nor will an added count for the same cause of action.¹²⁰ And where the liability is not increased above the penalty in the bond, by increasing the *ad damnum*, the surety is not released.¹²¹

§ 218. BRINGING IN NEW PARTIES AS DEFENDANTS.—The obligee has no right to bring in new parties as defendants and discontinue as to others already parties to the suit. Thus, if the plaintiff in a suit upon an attachment bond, discontinues as to one defendant and brings in a new party as defendant, without notice to the surety, the surety is discharged, although the defendant as to whom the action was discontinued was not a party to the bond.¹²²

§ 219. TRESPASS BY OFFICER.—A surety on a delivery bond

¹¹⁶ Tilton v. Coffield, 93 U. S. 163; Johnson v. Huntington, 13 Conn. 47; McKnight v. Strong, 25 Ark. 212; Wadsworth v. Cheney, 13 Iowa, 576; Scott v. Macy, 3 Ala. 250; Wood v. Squires, 28 Mo. 397; Mango v. Edwards, 1 E. D. Smith (N. Y.), 414.

¹¹⁷ Chapman v. Stucky, 22 Ill. App. 31.

¹¹⁸ Freeman v. Creech, 112 Mass. 180; Prince v. Clark, 127 Mass. 599; Wilks v. Adcock, 8 Term R. 27.

¹¹⁹ Kellogg v. Kimble, 142 Mass. 124.

¹²⁰ Doran v. Cohen, 147 Mass. 342.

¹²¹ Martin v. Moor, 2 Strange, 922; Townsend Nat. Bank v. Jones, 151 Mass. 454.

¹²² Richards v. Storer, 114 Mass. 101; Tucker v. White, 5 Allen, 323.

is not liable for a trespass committed by an officer in attaching property. Thus, a surety in an attachment bond, when the attachment has been sued out for a good cause, is not responsible for the failure of the officer to discharge his duty and for a trespass committed by him.¹²³ Nor is a surety liable, as held by some courts, for a trespass of an officer for seizing property on a void bond.¹²⁴

§ 220. DELIVERY BOND—RIGHTS OF SURETY AS TO PROPERTY.—As between the surety and the owner of the property after redelivery, the surety has the right to see that the property shall not be so disposed of, that delivery cannot be made according to the terms of the bond.¹²⁵ Because the surety is not bound to wait upon the creditor, nor is his right in this respect contingent, upon his demand, upon the creditor to ascertain his lien, and the latter's refusal to do so. Neither has the legal title, but both a general lien, and therefore their only recourse is in a court of equity, of which either can take advantage.¹²⁶

But as to third parties, the release of the attached property having been procured by giving a delivery bond, does not by reason of their suretyship entitle the sureties to the possession of the property.¹²⁷

In some States, however, a delivery bond is given in the alternative, conditioned for the delivery of the chattels or for the payment of their value, in case the attaching creditor gains his suit. Then the alternative condition does not discharge the lien on the property from the attachment lien; but the custody of the owner is substituted for that of the officer only,¹²⁸ the lien still subsisting.

¹²³ *Offtender v. Ford*, 92 Va. 636.

¹²⁴ *McDonald v. Felt*, 49 Cal. 354; *Dawson v. Baum*, 3 Wash. T. 464. Compare *Herring v. Hoppock*, 15 N. Y. 409; *Lovejoy v. Murry*, 3 Wall. 1; *Wetzell v. Waters*, 18 Mo. 396; *Ford v. Williams*, 13 N. Y. 584.

¹²⁵ *James v. Kennedy*, 10 Heisk. 607.

¹²⁶ *Dechard v. Edwards*, 2 Sneed, 93.

¹²⁷ *Stevenson v. Palmer*, 14 Colo. 565; *Loughlin v. Ferguson*, 6 Dana, 111.

¹²⁸ *Gass v. Williams*, 46 Ind. 253; *Gray v. Perkins*, 12 Smedes & M. (Miss.) 622.

§ 221. VOID BOND.—If there is no authority in law for the attachment, there can be none for taking the bond. If the attachment itself is illegal and therefore void, so also must be a bond which takes its place.¹²⁹ An action cannot be maintained on a bond given to obtain the liberation of property illegally seized by an officer, and the sureties on the bond therefore are not liable.¹³⁰

§ 222. DAMAGES.—The obligation of a surety in an undertaking in attachment is to pay the obligee thereof all damages sustained by reason of the attachment, if the order be wrongfully obtained.¹³¹ But if the property attached is not the defendant's, he can recover no damages,¹³² and of course the surety on the bond is not liable to him. But if the defendant has been injured, then he has his remedy in an action of tort against the officer, and not against the sureties on the attachment bond.¹³³

§ 223. THE SURETY IS CONCLUDED BY THE JUDGMENT AGAINST HIS PRINCIPAL.—In the absence of fraud or collusion, a judgment against the principal on the bond binds the sureties and is determinative for all purposes as to the value of the property taken by a delivery bond, and conclusive as to the sureties.¹³⁴ As to the sureties, the matter is *res adjudicata*, and cannot be set aside, except for fraud, accident or mistake.¹³⁵

§ 224. APPEAL BOND—DISCHARGE OF SURETIES.—The liability of sureties being contingent, anything legally satisfying

¹²⁹ Pacific Nat. Bank v. Mixer, 124 U. S. 721.

¹³⁰ Homan v. Brinckerhoof, 1 Denio, 184; Cadwell v. Colgate, 7 Barb. 253.

¹³¹ Hopewell v. McGrew, 50 Neb. 789.

¹³² Tebo v. Betancourt, 73 Miss. 868.

¹³³ Pinson v. Kirsh, 46 Tex. 29.

¹³⁴ Charles v. Hoskins, 14 Iowa, 471; Jaffray v. Smith, 106 Ala. 112; Triest v. Enslin, 106 Ala. 180.

¹³⁵ Dickerson v. Heman, 9 Daly (N. Y.), 298; Fuss v. Trager, 39 La. Ann. 292; Bergen v. Williams, 4 McLean, 125.

the judgment appealed from as against the principal will discharge the sureties; whatever discharges the judgment discharges also the liability of the obligors upon the bond.¹³⁶

But a levy of execution upon real property of sufficient value to satisfy the judgment does not, like the levy of an execution on personal property, operate, while the levy is undisposed of, as such a satisfaction of the judgment as will bar an attempt to enforce its collection in any other manner.¹³⁷

A surety is released on appeal bond when the principal debtor is discharged in bankruptcy, and no final judgment is rendered against the principal;¹³⁸ and the surety is discharged on reversal of the judgment,¹³⁹ provided the reversal is not set aside on further appeal; if it is set aside, then the surety's liability is revived, and he is responsible.¹⁴⁰ When the judgment on appeal is affirmed, the liability is fixed by the legal import of the conditions in the bond.¹⁴¹ And generally the liability of the sureties is measured by that of the principal.¹⁴² And the sureties may avail themselves of any defense available to their principal.¹⁴³ The extent of recovery generally is the judgment and interest, with costs, unless the bond provides otherwise.¹⁴⁴ But the sureties are not liable for attorney fees;¹⁴⁵ nor for rents and profits pending appeal affecting real estate, unless the statute so provides.¹⁴⁶

A sufficient tender of performance of the judgment by either

¹³⁶ *Cook v. King*, 7 Ill. App. 549; *Cass v. Adams*, 3 Ohio, 223; *Ellis v. Fisher*, 10 La. Ann. 479; *Noble v. Oil Co.*, 69 Pa. St. 407; *Stelle v. Lovejoy*, 125 Ill. 352; *Green v. Raftes*, 67 Ind. 49.

¹³⁷ *Gold v. Johnson*, 59 Ill. 63; *Herrick v. Swartwout*, 72 Ill. 340.

¹³⁸ *Martin v. Kilbourn*, 12 Heisk. 331; *Odell v. Wooten*, 38 Ga. 224.

¹³⁹ *Rothlinger v. Wonderly*, 66 Ill. 390.

¹⁴⁰ *Robinson v. Plimpton*, 25 N. Y. 484.

¹⁴¹ *Stull v. Hance*, 62 Ill. 52; *Graeter v. DeWolf*, 112 Ind. 4; *Noyes v. Granger*, 51 Iowa, 227.

¹⁴² *Sharon v. Sharon*, 84 Cal. 433; *Parnell v. Hancock*, 48 Cal. 452.

¹⁴³ *Sharon v. Sharon*, 84 Cal. 433.

¹⁴⁴ *Stelle v. Lovejoy*, 125 Ill. 352.

¹⁴⁵ *Noll v. Smith*, 68 Ind. 168.

¹⁴⁶ *Stultz v. Zahn*, 117 Ind. 277; *Opp v. Ward*, 125 Ind. 241.

the principal or sureties on the appeal bond discharges the sureties, whether accepted or not.¹⁴⁷

§ 225. **APPEAL TO A SPECIAL COURT.**—A surety is discharged on the appeal bond, if the judgment is affirmed by a court other than that mentioned in the bond.¹⁴⁸ Thus, where the bond specifies a particular court, and when it comes before that court a change of venue is taken, the sureties are discharged.¹⁴⁹ But if the bond is conditioned generally for the payment of the judgment if affirmed on appeal, then they are liable to whatever court the appeal is taken, even if there are successive appeals.¹⁵⁰

§ 226. **CHANGE OF ISSUE AND PARTIES.**—Sureties on appeal are discharged by any material change in the issue.¹⁵¹ And so if the parties are changed the sureties are discharged,¹⁵² as where the name of one of the joint plaintiffs on appeal is stricken out of the writ of error by order of the court.¹⁵³ But if the appeal is affirmed as to one of the defendants, and not as to the other, the sureties are still liable.¹⁵⁴ Nor is the surety discharged by the death of the principal and substitution of the principal's administrator.¹⁵⁵ When an appeal bond is given by several appellants, the undertaking is several as to each of the principals, and the sureties are liable accordingly, although the judgment is rendered against some, and not all, of their princi-

¹⁴⁷ *Spurgeon v. Smitha*, 114 Ind. 453; *Seans v. Van Dusen*, 25 Mich. 351; *Sharp v. Miller*, 57 Cal. 415; *Joslyn v. Eastman*, 46 Vt. 258; *Hampshire Bank v. Pillings*, 17 Pick. 87.

¹⁴⁸ *Smith v. Huesman*, 30 Ohio St. 662; *Sharp v. Bedell*, 10 Ill. 88; *Hinckley v. Kreitz*, 58 N. Y. 583.

¹⁴⁹ *Sharp v. Bedell*, 10 Ill. 88.

¹⁵⁰ *Robinson v. Plimpton*, 25 N. Y. 484; *Smith v. Crouse*, 24 Barb. 433.

¹⁵¹ *Evers v. Sager*, 28 Mich. 47; *Post v. Shafer*, 63 Mich. 85; *Sage v. Strong*, 40 Wis. 575; *Langley v. Adams*, 40 Me. 125.

¹⁵² *Thomas v. Cole*, 10 Heisk. 411.

¹⁵³ *Turner v. Nance*, 5 Ala. 718.

¹⁵⁴ *Alber v. Froehlich*, 39 Ohio St. 245; *McFarlane v. Howell*, 91 Tex. 219; *Ives v. Hulce*, 17 Ill. App. 35; *Hood v. Mathis*, 21 Nev. 308.

¹⁵⁵ *Bell v. Walker*, 54 Neb. 222; *Piercy v. Piercy*, 1 Ired. Eq. (N. Car.) 214.

pals on appeal.¹⁵⁶ Unless provided otherwise by statute, the contract of two or more sureties on the same appeal is joint only, and not joint and several or several,¹⁵⁷ so the discharge of one discharges all.¹⁵⁸

And so where the name of one of the joint plaintiffs in error is stricken out of the writ of error by order of the court the sureties are discharged.¹⁵⁹

§ 227. ENLARGEMENT OF CLAIM.—The increase of the claim without the sureties' consent destroys their liability where the bond is for a definite amount, and the enlargement exceeds this amount.¹⁶⁰ But if the bond is to secure any judgment which may be rendered without regard to a specified amount, an increase in the demand in the appellate court will not release the sureties.¹⁶¹ Some courts hold that there is no release of the surety by reason of an increase of liability by a subsequent legislative enactment.¹⁶²

§ 228. AGREEMENT OF LITIGANTS.—Sureties are discharged by any agreement of the litigants by which the obligation of the judgment appealed from is varied, or the time of payment is suspended.¹⁶³ Thus, where the parties agreed that the judgment might be paid in installments, after the appeal bond was signed, and the debtor failed to pay as agreed, the sureties are discharged.¹⁶⁴ And so where the litigants consent to an affirm-

¹⁵⁶ *McFarlane v. Howell*, 91 Tex. 218; *Ives v. Hulce*, 17 Ill. App. 35; *Warner v. Cameron*, 64 Mich. 21.

¹⁵⁷ *Wood v. Fisk*, 63 N. Y. 249; *Pickersgill v. Lahens*, 15 Wall. 140.

¹⁵⁸ *Gross v. Bouton*, 9 Daly, 25.

¹⁵⁹ *Turner v. Hance*, 5 Ala. 718.

¹⁶⁰ *Sage v. Strong*, 40 Wis. 575; *Willis v. Crooker*, 1 Pick. 204.

¹⁶¹ *Dressler v. Davis*, 12 Wis. 58; *Masser v. Strickland*, 17 S. & R. 354; *Hare v. Marsh*, 61 Wis. 435.

¹⁶² *Horner v. Lyman*, 4 Keyes (N. Y.), 237; *State v. Swinney*, 60 Miss. 39; *White v. Prigmon*, 29 Ark. 208. Compare *Davis v. People*, 1 Gil. (Ill.) 409.

¹⁶³ *Comegys v. Cox*, 1 Stew. (Ala.) 262; *Gardner v. Watson*, 13 Ill. 347; *Wingate v. Wilson*, 53 Ind. 78.

¹⁶⁴ *Leonard v. Gibson*, 6 Ill. App. 503.

ance of the judgment on appeal, the sureties are discharged;¹⁶⁵ and so if, by consent of the parties, judgment is taken against a portion only of the appellants;¹⁶⁶ and so where the creditor suspends execution on the judgment without consent of sureties.¹⁶⁷

Where the undertaking of a surety is to pay any judgment rendered against his principal, he is liable notwithstanding another maker of the note sued on was made a party in the appellate court and judgment rendered against both makers.¹⁶⁸ And a non-suit may be set aside by agreement on appeal without discharging the sureties.¹⁶⁹

§ 229. SUCCESSIVE APPEAL BONDS ARE CUMULATIVE.—The sureties on an appeal bond to an intermediate court are not discharged by a second appeal with a new bond to a higher court.¹⁷⁰ Thus, a surety on an appeal bond to an appellate court is not released by the execution and approval of a bond with a new surety for further appeal of the cause to the higher court, the bonds being in such case cumulative securities.¹⁷¹

Another question comes up under this head, as to the relative rights of the two sets of sureties. As between different sets of sureties who undertake to secure the same debt, although in different stages of legal proceedings, the primary liability rests upon the later set, and if they be discharged by the creditor, the first sureties will thereby also be discharged,¹⁷² because it deprives them of a remedy over to which they would otherwise have been entitled.¹⁷³

¹⁶⁵ *Johnson v. Flint*, 34 Ala. 673. Compare *Ammons v. Whitehead*, 31 Miss. 99; *Chase v. Beraud*, 29 Cal. 138.

¹⁶⁶ *Shimer v. Hightshue*, 7 Blackf. (Ind.) 238.

¹⁶⁷ *Wingate v. Wilson*, 53 Ind. 78.

¹⁶⁸ *Helt v. Whittier*, 31 Ohio St. 475, distinguishing *Lang v. Pike*, 27 Ohio St. 498; *Johnson v. Reed*, 47 Neb. 322; *Hood v. Mathis*, 21 Mo. 308; *Potter v. Van Vranken*, 36 N. Y. 629.

¹⁶⁹ *Bailey v. Rosenthal*, 56 Mo. 385.

¹⁷⁰ *Chester v. Broderick*, 131 N. Y. 549.

¹⁷¹ *Becker v. People*, 164 Ill. 267.

¹⁷² *Culliford v. Walser*, 158 N. Y. 65.

¹⁷³ *Hinckley v. Kreitz*, 58 N. Y. 583.

§ 230. INDEMNITY BONDS.—If the indemnity bond provides to save the officer harmless from any damages by a levy and sale of the property, there is no breach of condition until the officer has suffered actual damages by the payment of a claim against him.¹⁷⁴ If the condition of the bond imports an undertaking to save the officer harmless from any liability, the officer has the right of action upon the bond as soon as a liability is incurred, without the necessity of showing any payment.¹⁷⁵

§ 231. LIABILITY ON INDEMNITY BONDS.—It is the general rule, that if a judgment creditor gives a bond of indemnity to the officer to induce him to levy upon certain property and sell it, in the event of such property not being subject to execution, he becomes a joint trespasser with the officer and liable for the tort;¹⁷⁶ and so are the sureties upon such bond in trespass,¹⁷⁷ because all persons who direct or request another to do a trespass are liable as co-trespassers, and a bond of indemnity is virtually a request to trespass when the seizing of the property is unlawful.¹⁷⁸

However, in some States it is held that where the surety does not actually participate in the unlawful proceeding he cannot be held liable for the officer's tort.¹⁷⁹

§ 232. INJUNCTION BONDS—LIABILITY OF SURETY.—The liability of a surety on an injunction bond must be strictly construed, and he cannot be held liable beyond the precise terms of his undertaking.¹⁸⁰ So he is not liable for the unlawful acts of his principal which are done, save the damages which natur-

¹⁷⁴ *Gilbert v. Wiman*, 1 N. Y. 550.

¹⁷⁵ *White v. French*, 15 Gray, 339.

¹⁷⁶ *Knight v. Nelson*, 117 Mass. 458; *Herring v. Ho, pock*, 15 N. Y. 409; *Lovejoy v. Murray*, 3 Wall. 1.

¹⁷⁷ *Wetzell v. Waters*, 18 Mo. 396; *Ford v. Williams*, 13 N. Y. 584; *Screws v. Watson*, 48 Ala. 628; *Herring v. Hoppock*, 15 N. Y. 409.

¹⁷⁸ *Herring v. Hoppock*, 15 N. Y. 409.

¹⁷⁹ *McDonald v. Felt*, 49 Cal. 354; *Dawson v. Baum*, 3 Wash. T. 464; *Offerdinger v. Ford*, 92 Va. 636.

¹⁸⁰ *Ovington v. Smith*, 78 Ill. 250; *Hall v. Williamson*, 9 Ohio St. 17; *Lewis v. Leathery*, 14 Mo. App. 564.

ally result from the legal effect of the writ of injunction.¹⁸¹ The surety will be held only liable to the precise terms of his bond. Thus, where a judgment was stated in the bond to have been recovered at a certain term of court, when in fact it was at another term in the same year, the surety will be discharged.¹⁸² He cannot be held beyond the terms of his contract, and if these terms are varied without his consent he will be discharged.¹⁸³ But if the appellant obtains an injunction restraining the collection of the judgment affirmed on appeal and without the consent of the sureties, this does not discharge them.¹⁸⁴

§ 233. WHEN SUIT MAY BE BROUGHT FOR BREACH.—A surety on an injunction bond is entitled to have the case against his principal tried according to the form of law, and a final decree entered against him in court. Until there is such a final decree or determination of the equity of the suit, the surety is not liable.¹⁸⁵ And there must be a decision upon the merits. So a surety is discharged upon an injunction bond, by an agreement entered into, without his consent, by the parties litigant, to have the equity suit tried and determined in an irregular way, after the term of the court had ended.¹⁸⁶ If there be a corrupt arrangement between the creditor and principal by which the injunction is dismissed, the surety is discharged;¹⁸⁷ but in the absence of fraud, the dismissal of the injunction by agreement will not discharge the surety.¹⁸⁸

If an agreement is made between the parties, but the surety's liability is not changed, he is not discharged. Thus, an agree-

¹⁸¹ *Cummings v. Mugge*, 94 Ill. 186.

¹⁸² *Morgan v. Blackiston*, 5 Har. & J. 61.

¹⁸³ *Hall v. Williamson*, 9 Ohio St. 17.

¹⁸⁴ *Hodges v. Gervin*, 6 Ala. 478.

¹⁸⁵ *Monroe v. Gifford*, 35 Iowa, 646; *Gray v. Kerr*, 33 Mo. 159; *Bemis v. Gannett*, 8 Neb. 236; *Large v. Steer*, 121 Pa. St. 30; *Baker v. Frellson*, 32 La. Ann. 822; *Mix v. Vail*, 86 Ill. 40; *Loomis v. Brown*, 16 Barb. 325.

¹⁸⁶ *Baker v. Frellson*, 32 La. Ann. 322.

¹⁸⁷ *Boynton v. Robb*, 22 Ill. 625.

¹⁸⁸ *Boynton v. Phelps*, 52 Ill. 210.

ment of the parties which the court carries out, which is in effect a partial dissolution, the surety's liability not being increased, does not release him.¹⁸⁹ So if an order by stipulation modifying an injunction, does not change the liability of the principal or surety, the latter is not released.¹⁹⁰

§ 234. LIABILITY, JOINT AND SEVERAL.—The undertaking of a surety in an injunction bond, where there are several complainants, is in law for the principals, several as well as joint. The surety is bound that each and all of his principals shall perform and fulfill whatever decree may be rendered in the cause against all or either of them. Hence, the abatement of a suit in equity as to one of several joint plaintiffs by the neglect of both parties to revive; or the discharge of one upon some ground applicable to him alone, cannot affect the liability of the surety for the surviving party or parties against whom the final decree may have been properly rendered.¹⁹¹

§ 235. WHAT LAW GOVERNS.—An injunction bond must be construed with reference to the law in force when it was executed. The liability of the principal or surety cannot be changed by the passage of a statute which takes effect after the execution of the bond. Thus, a statute passed before execution of a contract or injunction bond, but which does not take effect until afterwards, is, as to such contract, inapplicable, and can have no effect on the contract or bond.¹⁹² The measure of liability of sureties is fixed by the terms of the instrument they sign, and such undertaking cannot be enlarged or varied by judicial construction. Their undertaking will be construed as the words used are ordinarily understood.¹⁹³

§ 236. DISSOLUTION BY SERIES OF ORDERS.—An injunction

¹⁸⁹ Backerbush v. Dorsett, 138 Ill. 167.

¹⁹⁰ Keith v. Henkleman, 173 Ill. 137.

¹⁹¹ Kelly v. Gordon, 3 Head, 683.

¹⁹² Mix v. Vail, 86 Ill. 40.

¹⁹³ Mix v. Singleton, 86 Ill. 194.

may be dissolved by a series of orders, one dissolving as to one part one day, and afterwards another, by consent of the parties; and so long as the liability of the surety is not made different or more burdensome thereby than it would have been by a single dissolution, embracing the entire subject-matter of the injunction, the surety will not be discharged.¹⁹⁴

§ 237. CONCLUDED BY JUDGMENT AGAINST PRINCIPAL.—A surety on an injunction bond cannot go behind the decree of court to raise questions of illegality as to an agreement on which it is founded.¹⁹⁵ And the decree of court cannot be set aside, on an injunction bond, by the surety, because the judgment against principal, in the absence of fraud or mistake, is conclusive as to him.¹⁹⁶

§ 238. REPLEVIN BOND.—Sureties on a replevin bond are bound only to the full value of the property not forthcoming on demand.¹⁹⁷ They are represented in a replevin suit by the plaintiff who has given the bond, and are identified with him in interest, so as to be concluded by the proceedings in the suit.¹⁹⁸ The surety cannot go behind the judgment on a replevin bond against the principal to question its validity except upon the ground of fraud or mistake.¹⁹⁹

§ 239. DISCHARGE OF SURETY.—Where a party begins a replevin suit and gives a bond conditioned to prosecute the action to final judgment, he commits a breach of his bond by discontinuing the suit before final judgment, though the damages may be nominal, and, hence, the sureties on such bond are not dis-

¹⁹⁴ *Blackerbush v. Dorsett*, 138 Ill. 167.

¹⁹⁵ *Oelrichs v. Spain*, 15 Wall. 211; *McAllister v. Clark*, 86 Ill. 236.

¹⁹⁶ *McAllister v. Clark*, 86 Ill. 236. See, also, *Richardson v. Bank*, 57 Ohio St. 299.

¹⁹⁷ *Miles v. Davis*, 36 Tex. 690.

¹⁹⁸ *Washington Ice Co. v. Webster*, 15 Wall. 426.

¹⁹⁹ *Richardson v. Bank*, 57 Ohio St. 299; *Thomas v. Markman*, 70 Neb. 623; *Schott v. Youree*, 142 Ill. 233; *McFadden v. Fritz*, 110 Ind. 1; *Cox v. Harbranft*, 154 Pa. St. 457.

charged by his dismissal of the suit.²⁰⁰ And where the replevin bond is insufficient the court may order another bond, and the latter will have no effect on the liability of the sureties on the first bond, so as to discharge them.²⁰¹ And if the additional bond is not executed and filed according to the order of court, the case may be dismissed.²⁰²

If the damages awarded are less than the amount named in the first bond, judgment may be rendered against the sureties on the first bond alone.²⁰³ The new bond is not substituted for the old, but is additional.

§ 240. NEW PARTIES—SUBSTITUTION.—If a new party be substituted for the defendant, it discharges the surety.²⁰⁴ And so if one of the defendants is discharged during the suit the surety on the replevin bond is discharged.²⁰⁵ But it is held that a court may substitute the owner of the property in an action of replevin, in the place of his agent, against whom the suit was brought, and that such substitution does not discharge the sureties on the bond, but they continue bound for the new party, equally as if he had been the original and only defendant.²⁰⁶

§ 241. VARYING THE TERMS OF THE BOND.—A surety is discharged if the replevin bond is varied without his consent. Thus, where the parties agree to refer the case to arbitration, without the surety's consent, and the case is so settled, the surety is discharged.²⁰⁷ The surety does not undertake to pay the damages which may result, only as determined by a court of competent jurisdiction; if the controversy is referred to arbitrators, this discharges the sureties.²⁰⁸

²⁰⁰ *Alderman v. Roesel*, 52 S. Car. 162.

²⁰¹ *Smith v. Whitten*, 117 N. Car. 389.

²⁰² *Smith v. Ruby*, 6 Heisk. 546.

²⁰³ *Smith v. Whitten*, 117 N. Car. 389.

²⁰⁴ *Smith v. Ruby*, 6 Heisk. 546.

²⁰⁵ *Harris v. Taylor*, 3 Sneed, 536. See, also, *Wiggins v. Wells*, 2 Sneed, 154.

²⁰⁶ *Hanna v. Petroleum Co.*, 23 Ohio St. 622.

²⁰⁷ *Archer v. Hale*, 4 Bing. 464.

²⁰⁸ *Perkins v. Rudolph*, 36 Ill. 306; *Moore v. Bowmaker*, 3 Price, 214.

CHAPTER X.

BONDS OF PERSONS ACTING UNDER JUDICIAL SANCTION.

§ 242. EXECUTORS AND ADMINISTRATORS.—The general rule is that a default of the executor or administrator must be established in proper proceedings against him before the sureties can be prosecuted upon their bond for the default of their principal.¹ But wherever the principal absconds, conceals himself, or resides without the jurisdiction of the court, then suit will lie on the bond against the sureties without recourse, in the first place, to the principal. Such cases form an exception to the general rule which is established for the protection of the sureties where it can be done consistently with the preservation of the rights of legatees and creditors.² And so where the executor or administrator is dead, the sureties may be sued at once, because a demand upon the principal has become impossible.³ However, in some jurisdictions it is not necessary to a right of recovery that a default has been established against the principal.⁴ If the bond has no obligee, it is void.⁵ The liability of the surety cannot extend beyond the terms of the bond.⁶

§ 243. ESTOPPEL BY JUDGMENT AGAINST PRINCIPAL.—In the absence of fraud or collusion, the sureties are concluded by a decree of the proper court as to their principal's liability, even though they are not parties to such suit.⁷ However, if the prin-

¹ *Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 N. Y. 219; *State v. Pare*, 28 Mo. App. 512; *Commonwealth v. Stub*, 11 Pa. St. 150; *Alexander v. Bryan*, 110 U. S. 414.

² *Commonwealth v. Wenrick*, 8 Watts, 159; *Giles v. Brown*, 60 Ga. 658.

³ *People v. Admire*, 39 Ill. 251. See, also, *Bischoff v. Engel*, 10 App. Div. 240.

⁴ *Tucker v. People*, 87 Ill. 76; *State v. Johnson*, 7 Blackf. (Ind.) 520; *State v. Shelby*, 75 Mo. 482; *Morgan v. West*, 43 Ga. 275.

⁵ *Tidhall v. Young* (Neb.), 78 N. W. Rep. 507.

⁶ *People v. Hoffman*, 182 Ill. 390.

⁷ *Judge v. Sulloway*, 68 N. H. 511; *Meyer v. Borth*, 97 Wis. 352; *Heard v.*

cial is not properly before the court, and the court has no jurisdiction, then the surety is not concluded by such decree.⁸

In some jurisdictions it is held that a judgment against an administrator or executor is only *prima facie* evidence, and not conclusive upon the surety.⁹ Thus, a surety may plead and prove after judgment against his principal, the deficiency of assets in the hands of his principal, liable to the payment of the debt.¹⁰ And so sureties on a bond are not liable to a creditor of the estate for the amount of judgment obtained by him in an action against the principal, commenced after the claim was barred by the statute of limitations, to which action the principal appeared and plead the statute, and then let the suit go by default.¹¹ And so if the administrator fails to plead the statute of limitations, in an action against the surety, he may set it up as a defense.¹²

§ 244. INCOME OF REAL ESTATE.—A surety on an administrator's or executor's bond is liable for conversion, waste or appropriation of property of the decedent's estate only of such property as comes into his hands subject to administration under the bond.¹³ When sureties sign the administration bond, they contract only to indemnify the persons' interest in the personal estate for which such bond is given, and will not be liable on it for the proceeds of real estate sold by such principal; they are not liable for the income of the decedent's real estate.¹⁴ Where

Lodge, 20 Pick. 53; Stovall v. Banks, 10 Wall. 583; Casoni v. Jerome, 58 N. Y. 314; Housh v. People, 66 Ill. 178; McKim v. Haley, 173 Mass. 112; Harrison v. Clark, 87 N. Y. 572.

⁸ Robinson v. Hodge, 117 Mass. 222; State v. Drake, 52 Ark. 350; Loop v. Northup, 59 Hun, 75.

⁹ Bennett v. Graham, 71 Ga. 211; Bird v. Mitchell, 101 Ga. 46.

¹⁰ Gibson v. Robinson, 91 Ga. 756.

¹¹ Robinson v. Hodge, 117 Mass. 222.

¹² Dawes v. Shed, 15 Mass. 6. See, also, Thayer v. Hollis, 3 Met. 369.

¹³ Jackson v. Wilson, 117 Ala. 432.

¹⁴ Douglass v. Mayor, 56 How. Pr. 178; Young v. People, 35 Ill. App. 363; Commonwealth v. Gibson, 8 Watts, 214; Reed v. Commonwealth, 11 Serj. & R. 441; Robinson v. Millard, 133 Mass. 236; Hoffman v. People, 78 Ill. App. 345, 182 Ill. 390.

the executor has authority to sell real estate and convert it into personalty, such sale works an equitable conversion, it is held, and the real estate is to be considered as personal property, and the sureties can be ultimately held responsible for the results of such action.¹⁵ But other courts hold that a new bond shall be executed by the principal or executor, on selling real estate, and the sureties on the first bond are not liable for his default as to the accounting for proceeds of such sale, though the executor has authority to re-invest them.¹⁶ Some courts hold that the sureties on the first bond are liable for the income of real estate.¹⁷ But this matter is to a great extent regulated by statute, which makes sureties responsible for the proceeds or rents and profits of real estate received by the executor or administrator in his representative capacity, as well as for personalty.¹⁸

There is a conflict of authority in the decisions of the several States as to whether the sureties are liable for the proceeds of real estate, received by the principal, and they cannot be reconciled by reason of the differences which exist in the form of the bond considered in the several cases.¹⁹ The local statute and form of bond should be consulted in every case.

§ 245. SALE OF REAL ESTATE BEYOND JURISDICTION OF COURT.—By the weight of authority, the sale of real estate, beyond the jurisdiction where the will is probated, is inoperative and can have no extra-territorial force or validity; and the executor of such will cannot, because of his appointment in accordance with the laws of one State, thereby acquire authority to sue for,

¹⁵ *Hood v. Hood*, 85 N. Y. 561; *Hartzell v. Commonwealth*, 42 Pa. St. 453; *Emmons v. Gordon*, 140 Mo. 490.

¹⁶ *Hoffman v. People*, 78 Ill. App. 345; *Bunce v. Bunce*, 65 Iowa, 106; *Robinson v. Millard*, 133 Mass. 236; *Morris v. Cooper*, 35 Kan. 156; *Warwick v. State*, 5 Ind. 350.

¹⁷ *Dix v. Morris*, 66 Mo. 514; *Lindley v. State*, 115 Ind. 502; *Mann v. Everts*, 64 Wis. 372; *Reherd v. Long*, 77 Va. 839.

¹⁸ *Hawkins v. Kimball*, 57 Ind. 45; *Decker v. Decker*, 74 Me. 465; *Griswold v. Frink*, 22 Ohio St. 90; *Dix v. Morris*, 66 Mo. 514; *Reherd v. Long*, 77 Va. 839.

¹⁹ *Probate Court v. Hazard*, 13 R. I. 3. This case discusses the different decisions, and its review is valuable. *White v. Ditson*, 140 Mass. 351.

or in any manner intermeddle with such realty or effects of his testator, unless the will be there proved, or the law of such State dispenses with the probate conferring the requisite permission.²⁰ Hence, the sureties of an executor are not liable for the default of an executor to account for the proceeds of the sale of real estate in another State, where it is not shown that the will was probated in the other State, nor that the sale was made in accordance with the laws of the other State.²¹ But there are authorities announcing a different rule, which holds that where an executor qualifies in one State to sell land in another State which belongs to his testator, under the power of the will, the principal and his sureties are liable for the default of the principal in accounting for the proceeds of such sale of the extra-territorial lands.²²

§ 246. SURETY IS LIABLE ONLY FOR PRINCIPAL'S OFFICIAL ACTS.—Sureties on the bond of an administrator or executor are liable only for acts of nonfeasance or misfeasance of their principal in respect of his official acts. If the principal fairly and honestly administers the estate committed to his care and pays to the distributees their proper shares of the estate, then his sureties are discharged from all obligations upon his official bond.²³ Hence, the giving of a note by the administrator is such a departure from his authority as to relieve the estate and also his sureties from liability as to the payment of the note.²⁴

A surety is not bound to answer for the default of an executor or administrator in any line of actions not within his official capacity.²⁵ So a surety in an executor's bond is not liable for

²⁰ *Kerr v. Moon*, 9 Wheat. 565; *Doe v. McFarland*, 9 Cranch, 151; *Lucas v. Tucker*, 17 Ind. 41; *Wills v. Cooper*, 2 Ohio St. 124; *Emmons v. Gordon*, 140 Mo. 490.

²¹ *Emmons v. Gordon*, 140 Mo. 490.

²² *Hooper v. Hooper*, 29 W. Va. 276; *Judge v. Heydock*, 8 N. H. 491.

²³ *Bird v. Mitchell*, 101 Ga. 46.

²⁴ *Coruthwaite v. Bank*, 57 Ind. 268; *Rittenhouse v. Ammerman*, 64 Mo. 197; *Gregory v. Leigh*, 33 Tex. 813; *Curtis v. Bank*, 39 Ohio St. 579.

²⁵ *Shields v. Smith*, 8 Bush, 601; *State v. Elliott (Mo.)*, 57 S. W. Rep. 1087; *State v. Anthony*, 30 Mo. App. 638.

rents and profits of the real estate of the testator received by executor and charged to him by the court, when he has no such authority to collect by law.²⁶ The surety is not bound to settle for the rents and profits of the testator's land converted by his principal.²⁷ So where no duty is imposed upon the executor as executor, but upon him as a devisee under the will, he is liable only as devisee, and not as executor, and so there is no liability upon his surety as executor.²⁸ In general, sureties are responsible for the performance of the executorial duties such as defined by law, such as collecting of the personal assets, the faithful performance of his duties, as the appropriation of the payments to the debts and legacies and the proper accounting of the personal property. But they are not liable for failure of the execution of the trusts imposed by the will.²⁹ And the sureties on the bond of a public administrator are only liable for money coming into his hands in his official capacity.³⁰

§ 247. GIVING NEW OR ADDITIONAL BOND.—Whether the new or additional bond releases the sureties on the prior bond depends upon the statute. It is generally held that if the application for a new bond is made by a surety on the prior bond, the surety on the prior bond is released from liability for all defaults of the principal after the new bond is executed and approved. But if the court acts on his own motion, or if the application is made by some person other than a surety, the new bond is ordinarily cumulative in its effect and the sureties on the prior bond remain liable. In some jurisdictions the court may, by statutory provisions, on the application of any surety who conceives himself to be in danger by reason of his suretyship on the bond, require the principal to give another bond under penalty of being removed from office.³¹

²⁶ *Gregg v. Currier*, 36 N. H. 200.

²⁷ *McCoy v. Scott*, 2 Rawle, 222; *Gibson v. Farley*, 16 Mass. 280.

²⁸ *Sims v. Lively*, 14 B. Mon. 433.

²⁹ *Carter v. Young*, 9 Lea, 210; *Drane v. Baylies*, 1 Hum. 173; *Hughlett v. Hughlett*, 3 Hum. 452.

³⁰ *State v. Elliott (Mo.)*, 57 S. W. Rep. 1087.

³¹ *Johnson v. Frequay*, 1 Dana, 514; *Stevens v. Stevens*, 3 Redf. (N. Y.), 507; *Foster v. Wise*, 46 Ohio St. 20.

When the first bond continues in force and is obligatory upon the makers as if the second had not been given, a creditor or other person interested in the estate has his election upon which bond to sue, if the maladministration for which suit is brought is a breach of both bonds.³²

When the principal gives a new bond, there is no new commitment of the estate to his hands, nor is there any settlement of, or rest made in, his accounts, unless so ordered by statute. And this new bond covers the whole liability of the administrator to the estate, whether incurred before or after execution.³³

One class of cases holds that the sureties in the new bond are primarily liable for the whole amount for which the principal ought to account; that is, the last bond should be exhausted before resort can be had to the first for any defalcation that occurred before the sureties on it are discharged.³⁴ But this is contrary to the general rule.³⁵ Still other courts hold that the first sureties are primarily liable, and if the last sureties have paid the debt, they may recover against the first the full amount paid by them.³⁶

A surety may be released in some jurisdictions after a settlement has been made by his principal, after which the surety is no longer liable,³⁷ but the statute must be strictly followed.³⁸ So, unless permitted by statute, a surety cannot be discharged upon the application of the executor.³⁹

³² *Pinkstaff v. State*, 59 Ill. 148.

³³ *Scofield v. Churchill*, 72 N. Y. 565; *Morris v. Morris*, 9 Heisk. 814; *Choate v. Arrington*, 116 Mass. 552; *Pinkstaff v. State*, 59 Ill. 148; *State v. Berning*, 74 Mo. 87; *Foster v. Wise*, 46 Ohio St. 20; *Pepper v. Donnelly*, 87 Ky. 259; *State v. Barrett*, 121 Ind. 92; *Rudolph v. Malone* (Wis.), 80 N. W. Rep. 743; *Dugger v. Wright*, 51 Ark. 232; *Brown v. State*, 23 Kan. 235.

³⁴ *Bobo v. Vaiden*, 20 S. Car. 271; *Morris v. Morris*, 9 Heisk. 814.

³⁵ *State v. Berning*, 74 Mo. 87; *Pinkstaff v. State*, 59 Ill. 148; *Choate v. Arrington*, 116 Mass. 552.

³⁶ *Corrington v. Foster*, 51 Ohio St. 225.

³⁷ *Clark v. Surety Company*, 171 Ill. 235.

³⁸ *Hickerson v. Price*, 2 Heisk. 623.

³⁹ *Bellinger v. Thompson*, 26 Oreg. 320; *Clark v. Surety Co.*, 171 Ill. 235.

§ 248. **LIABILITY OF DISCHARGED SURETY.**—It will be presumed that the administrator performed his duty until the contrary is proved; and to render a discharged surety liable, it must be alleged and proved that before his discharge, the administrator had misapplied the assets of the estate. In the absence of such proof, the surety on the new bond is alone liable,⁴⁰ where the statute declares the discharged surety shall be liable only for such misconduct as happened prior to giving the new bond.⁴¹

§ 249. **SURETIES ON JOINT BONDS.**—If there are more than one principal of the estate, and one or more of them are removed, die or resign their office, then the remaining must discharge the whole duties required by law respecting the estate. And the sureties on the joint bond are liable for the subsequent acts of the remaining principals,⁴² during their administration.⁴³ Before discharge, the administrator must account to his co-administrators, and then if the latter give a new bond it operates to exonerate the sureties upon the joint bond, and from liability for a *devastavit* after such order of discharge.⁴⁴

One of the joint administrators may bring suit against the sureties on a joint bond for a default of one of his co-administrators and recover the full amount of defalcation from the sureties.⁴⁵ And after the sureties have paid, they have their remedy, if they have any, against the administrator who sued them, in his individual capacity, as one of their principals, for indemnity.⁴⁶

§ 250. **ALLOWANCES TO INTTESTATE'S WIDOW AND FAMILY.**—

⁴⁰ *Phillips v. Barzeal*, 14 Ala. 146; *McKim v. Bartlett*, 129 Mass. 226; *State v. Stroop*, 22 Ark. 328; *Beard v. Roth*, 35 Fed. Rep. 397.

⁴¹ *Beard v. Roth*, 35 Fed. Rep. 397.

⁴² *Dobyns v. McGovern*, 15 Mo. 662.

⁴³ *State v. Rucher*, 59 Mo. 17; *Marsh v. People*, 15 Ill. 284; *Braser v. Clark*, 5 Pick. 96; *Towne v. Ammidon*, 20 Pick. 535.

⁴⁴ *Veach v. Rice*, 131 U. S. 293.

⁴⁵ *Boyle v. St. John*, 28 Hun, 454; *Sperb v. McCoun*, 110 N. Y. 606.

⁴⁶ *Boyle v. St. John*, 28 Hun, 454; *Sperb v. McCoun*, 110 N. Y. 606.

In the States where allowances are made directly to the family of the decedent, his representatives have no control over them. So if an administrator interferes with such property, he is individually liable as a tort-feasor, and, of course, his sureties are not liable for his act.⁴⁷ Thus, money on hand set apart by law for the support of the widow of the decedent and his family, belongs to her for that purpose, and is not assets in the hands of the administrator, and if he converts it, no recourse can be had against his sureties.⁴⁸

But if the statute requires the executor or administrator to pay over the money to the widow and family, or specifies articles allowed, then the sureties on his bond are liable for his default in non-compliance with the law.⁴⁹

§ 251. EXECUTOR OR ADMINISTRATOR DEBTOR TO THE ESTATE.—The rule of the common law is, that the appointment and qualification of a debtor to the estate as executor of his creditor's assets, operates as a legacy of the debt and discharges the executor from its payment, and of course the sureties on his bond are not liable for the collection of such debt. But this rule has been greatly qualified in England, and probably never existed in the United States. But the rule in the United States is not uniform. One line of cases holds that such debt becomes, *prima facie*, assets in the hands of the principal, to be accounted for and adjusted in court as assets of the estate actually realized, and a default of the principal to account for such debt, makes his sureties liable as if it was any other assets.⁵⁰ That is, the acts of the principal in dealing with the instruments of which his indebtedness to the estate arises, cannot vary or affect the rule that, as a contract between him and the estate, they are extinguished, and the amounts due upon such instruments have become assets of the estate, and if default is made by the principal, the sureties

⁴⁷ *Morris v. Morris*, 9 Heisk. 814.

⁴⁸ *Rocco v. Cicalla*, 12 Heisk. 508; *Bayless v. Bayless*, 4 Cold. 359.

⁴⁹ *Commonwealth v. Longenecker*, 1 Chester County Rep. (Pa.) 202.

⁵⁰ *Waukford v. Waukford*, 1 Salk. 299; *Cheetham v. Ward*, 1 Bos. & P. 630; *Freakley v. Fox*, 9 Barn. & Cr. 130; *Winship v. Bass*, 12 Mass. 199.

are liable for these debts as so much cash received, though the administrator or executor owing the estate was insolvent during the period of his office.⁵¹ And the sureties will not be discharged from such liability by fraud of the principal in procuring their execution of the bond, where the beneficiaries of the estate in whose interest the liability is sought to be enforced are themselves innocent of the fraud.⁵²

Another line of cases holds that if such principal is insolvent at the time of his appointment, his failure to pay his debt is not a breach of the trust for which the sureties are liable; and so if the principal, in accounting, treats his own debt as available assets, and the court decrees distribution accordingly, the sureties are not bound by the decree, and a court of equity will grant the sureties relief.⁵³ Such principal should charge himself with the debt; but his sureties are not liable for it, if they show that he was insolvent beyond the amount that could have been saved to the estate by the exercise of diligence.⁵⁴ But where the principal is solvent, it is his duty to inventory and account for his own debts to the estate. If he does not, his sureties are liable for the same.⁵⁵

§ 252. COMMON LAW RULE AS TO EXECUTOR BEING DEBTOR TO THE ESTATE—STATUTORY PROVISIONS.—Except as against creditors, an executor's indebtedness to the testator was by the common law released or extinguished.⁵⁶ But this has been

⁵¹ *McGaughey v. Jacoby*, 54 Ohio St. 487; *Tracy v. Cord*, 2 Ohio St. 431; *Chapin v. Waters*, 110 Mass. 195; *Judge v. Sulloway*, 68 N. H. 511; *Wright v. Long*, 66 Ala. 389; *Treweek v. Howard*, 105 Cal. 434.

⁵² *McGaughey v. Jacoby*, 54 Ohio St. 487; *Treweek v. Howard*, 105 Cal. 434.

⁵³ *Lyon v. Osgood*, 58 Vt. 707; *Potter v. Titcomb*, 7 Me. 302; *McCarty v. Frazer*, 62 Mo. 263; *Harker v. Irick*, 10 N. J. Eq. 269; *Baucus v. Barr*, 45 Hun, 582, 107 N. Y. 624; *Rader v. Yeargin*, 85 Tenn. 486; *Garber v. Commonwealth*, 7 Pa. St. 265; *Piper's Estate*, 15 Pa. St. 533.

⁵⁴ *State v. Gregory*, 119 Ind. 503.

⁵⁵ *Probate Court v. Merriam*, 8 Vt. 234; *Condit v. Winslow*, 106 Ind. 142; *Piper's Estate*, 15 Pa. St. 533; *Rader v. Yeargin*, 85 Tenn. 486.

⁵⁶ *Gardner v. Miller*, 19 Johns. 188; *Marvin v. Stone*, 2 Cow. (N. Y.) 781; *Co. Litt.* 264, b, note 1; 2 *Bl. Com.* 512; *Thomas v. Thompson*, 2 Johns. 471

changed by statute in many States, making him liable for his own debt to the estate and thereby binding his sureties.⁵⁷

But without any special statute, this doctrine was accepted in Massachusetts, Maine, Connecticut and Vermont,⁵⁸ either on the ground of statutes providing for the settlement of estates and the distribution of property not devised or liquidated,⁵⁹ or on the ground that the common law doctrine had never been adopted by the State.⁶⁰ This is the general rule, whether controlled by special statute or not, as the common law is repudiated. So the sureties are liable for the executor's or administrator's debt to the testator, as they are his privies, and their liability is co-extensive with that of the principal.⁶¹

So whenever the probate court enters a decree against their principal which binds the principal, their liability is also de-limited.⁶² And the administrator is not permitted to show that he could not collect a debt due from himself.⁶³ The consequence is, that he and his sureties are liable for the amount of such debt, in like manner as if he had received it from any other debtor of the testator; and it is presumed that the sureties had in contemplation this liability when they executed the bond, and, hence, cannot complain of their own natural and legal consequence of their voluntary act.⁶⁴ It is held that if at the time the surety assumes responsibility the executor is able to pay his debt to the estate, or afterwards, during the settlement of the estate, he becomes able to pay it, the surety is responsible for it as assets. When the executor is solvent and able to pay, and

⁵⁷ *Judge v. Sulloway*, 68 N. H. 511; *Norris v. Towle*, 54 N. H. 290; *Soverhill v. Snyder*, 59 N. Y. 140; *Baucus v. Stover*, 89 N. Y. 1; *In re Con-salus*, 95 N. Y. 340.

⁵⁸ *Leland v. Felton*, 1 Allen, 531; *Winship v. Bass*, 12 Mass. 198; *Probate Court v. Merriam*, 8 Vt. 234.

⁵⁹ *Winship v. Bass*, 12 Mass. 198; *Probate Court v. Merriam*, 8 Vt. 234.

⁶⁰ *Bacon v. Fairman*, 6 Conn. 121; *Williams v. Morehouse*, 9 Conn. 470; *Davenport v. Richards*, 16 Conn. 310; *Potter v. Titcomb*, 7 Me. 302.

⁶¹ *Wattles v. Hyde*, 9 Conn. 10; *Judge v. Sulloway*, 68 N. H. 511.

⁶² *Stovall v. Banks*, 10 Wall 583; *Choate v. Arrington*, 116 Mass. 552; *Towle v. Towle*, 46 N. H. 431; *Deobold v. Oppermann*, 111 N. Y. 531.

⁶³ *Kinney v. Ensign*, 18 Pick. 232.

⁶⁴ *Stevens v. Gaylord*, 11 Mass. 256.

no surety is needed, the surety is responsible for his debt; but where the executor is unable to pay and a surety's liability should be valuable, the surety is not liable.⁶⁵

§ 253. GENERAL LIABILITY OF SURETIES.—The liability of sureties on the bond of executors and administrators is generally co-extensive with that of their principal.⁶⁶ Thus, they are liable for misappropriation of funds of the estate;⁶⁷ for non-payment of the profits of such fund;⁶⁸ for the principal's default in performing his official duties.⁶⁹ But the sureties are not liable for acts which are not within the scope of their principal's powers and duties, even if such acts are ordered to be done by the court;⁷⁰ nor when the acts of the principal are personal and not official.⁷¹ So where the agent of a creditor of the decedent takes out letters of administration pursuant to a power of attorney given him by his principal, the sureties on his bond are not liable.⁷² A failure of the principal to make proper collection of assets is a maladministration for which the sureties are liable;⁷³ and so where the executor neglects to follow the directions in the will;⁷⁴ and so where he neglects to sell the goods of the estate when necessary;⁷⁵ and when he fails to take proper security for goods sold on credit.⁷⁶ If his acts of omission work

⁶⁵ *Lyon v. Osgood*, 58 Vt. 707; *Harker v. Irick*, 10 N. J. Eq. 269.

⁶⁶ *Goltra v. People*, 53 Ill. 224; *State v. Purdy*, 67 Mo. 89.

⁶⁷ *State v. Wilmer*, 65 Md. 178; *State v. Brown*, 80 Ind. 425.

⁶⁸ *Watson v. Whitten*, 3 Rich. (S. Car.) 224.

⁶⁹ *Worgang v. Clipp*, 21 Ind. 119; *State v. Anthony*, 30 Mo. App. 638; *Wade v. Graham*, 4 Ohio, 126; *Clarke v. West*, 5 Ala. 117; *Smith v. Jewett*, 40 N. H. 513.

⁷⁰ *Nelson v. Woodbury*, 1 Me. 251.

⁷¹ *Merrill v. Harris*, 26 N. H. 142; *McLean v. McLean*, 88 N. Car. 794; *Kennedy v. Adickes*, 37 S. Car. 174; *Sarle v. Court*, 7 R. I. 270; *Davis v. Hoopes*, 33 Miss. 173.

⁷² *Moodick v. Penman*, 3 Desaus. (S. Car.)

⁷³ *Butler v. Sisson*, 49 Conn. 580; *Lyon v. Osgood*, 58 Vt. 707; *Lacy v. Stamper*, 27 Gratt. 421.

⁷⁴ *Sanford v. Gilman*, 44 Conn. 461; *Prescott v. Pitta*, 9 Mass. 376; *Heady v. State*, 60 Ind. 316.

⁷⁵ *State v. Scott*, 12 Ind. 529.

⁷⁶ *White v. Moe*, 19 Ohio St. 37.

no injustice to the estate his sureties are not liable;⁷⁷ or if his acts were performed at the request of the parties in interest.⁷⁸

§ 254. SAME PERSON ADMINISTRATOR OF ONE ESTATE AND EXECUTOR OF ANOTHER.—One person can be the administrator of one estate and executor of another. In such case the liability of his sureties may be complicated. But as a general rule, one set of sureties are not liable for the defaults as to the other estate. So the sureties on his administrator's bond do not incur any liability in respect to his acts as executor of the other estate, though the testator and the intestate were partners in business. Such relation does not affect the right of the creditor of the intestate to have his separate estate applied to the payment of his individual debts, and does not make the sureties on the administrator's bond liable for waste committed by him as executor.⁷⁹ But if one estate is indebted to the other, the waste of the debtor estate, instead of paying over to the creditor estate, makes the sureties of the creditor estate liable for such default,⁸⁰ because the debtor estate was assets in his hands to pay the creditor estate.

§ 255. EXECUTOR OR ADMINISTRATOR ACTING IN OTHER FIDUCIARY CAPACITY.—An executor or administrator often becomes a trustee or guardian of parties interested in the estate, and it may become difficult to place the liability on the two sets of sureties. The general rule is the administrator's or executor's bond only covers his duties acting in that capacity, and not those which are in another fiduciary character.⁸¹ Thus, where the administrator is also guardian, the law will adjudge the ward's portion of the property then in his hands to be in his possession in the capacity of guardian after the time limited by law for the settlement of the estate, whether a final account has

⁷⁷ *Rison v. Young*, 7 Martin, N. S. 298; *State v. Smith*, 68 Mo. 641.

⁷⁸ *Brazer v. Clark*, 5 Pick. 96; *Howes v. O'Connor*, 9 Tex. Civ. App. 454.

⁷⁹ *Norman v. Buckner*, 135 U. S. 500.

⁸⁰ *Morrow v. Penton*, 8 Leigh, 54.

⁸¹ *Bell v. People*, 94 Ill. 230.

been passed upon by the proper court or not, upon the principle that what the law has enjoined upon him to do, it shall be considered as done, and from that time he holds the ward's proportion of the property by operation of law in that character into which he would be entitled to receive it upon the final completion of his trust as executor or administrator; by operation of law there was a transmutation of the same to him as guardian, and he no longer holds the same as administrator or executor.⁸² But in other jurisdictions it is held that until the administrator or executor has rendered an account or done some act to indicate that he has transferred the property from himself in the one capacity to himself in the other character, he acts as executor or administrator, and his sureties are therefore liable accordingly.⁸³

If the bond covers all of the duties imposed by the law, then the sureties are liable for the faithful performance of the principal's duties in their fiduciary trust unless contrary to statute.⁸⁴

§ 256. FAILURE TO RETURN INVENTORY OR TO ACCOUNT.—If the administrator or executor fails to return an inventory as specified by law, he is in default for which his sureties are liable.⁸⁵ The extent of the liability for a breach of the condition to file an inventory, is the amount that may be found equitably due to any one who is injured thereby.⁸⁶ If no damages result, then there is no injury and no recovery can be had.⁸⁷

§ 257. RELEASE OF SURETIES.—The sureties on an administrator's or executor's bond will be released whenever their liabil-

⁸² *Bell v. People*, 94 Ill. 230; *Taylor v. Delbois*, 4 Mason, 131; *Pratt v. Northam*, 5 Mason, 95; *Watkins v. Shaw*, 2 Gill & J. (Md.) 220; *Cranson v. Wilsey*, 71 Mich. 356; *White v. Ditson*, 140 Mass. 351; *Woolley v. Price*, 86 Md. 176.

⁸³ *Cluff v. Day*, 124 N. Y. 460; *Potter v. Ogden*, 136 N. Y. 384; *Gilmer v. Baker* 24 W. Va. 72.

⁸⁴ *State v. Wilmer*, 65 Md. 178; *Walker v. Patillo*, 7 Lea, 449.

⁸⁵ *People v. Hunter*, 89 Ill. 392; *Forbes v. McHugh*, 152 Mass. 412; *Walker v. Hall*, 1 Pick. 20; *State v. Scott*, 12 Ind. 529; *Sherwood v. Hill*, 25 Mo. 391; *Mighton v. Dawson*, 38 Ohio St. 650; *Commonwealth v. Bryan*, 8 Serg. & R. 128.

⁸⁶ *State v. French*, 60 Conn. 478.

⁸⁷ *Reynolds v. Reynolds*, 11 Ala. 1023; *State v. Gregory*, 119 Ind. 503.

ity is changed or increased without their assent. Thus, a secret agreement between the distributee of an estate and the administrator thereof, that the administrator may use the fund in his private business, operates to discharge the sureties upon his bond.⁸⁸ The principal has no right to convert the assets to his private use, nor to speculate with them, nor to invest them in trade or manufacturing business, either upon his own account or that of the estate. If he does he is liable; and if the beneficiary agrees to such maladministration, the sureties are released.⁸⁹ Any alteration of the bond without the sureties' consent will discharge them.⁹⁰ A discharge of the principal will also discharge his sureties.⁹¹ And the re-appointment of a resigning administrator with new bond will discharge the sureties on his first bond.⁹² Sureties are generally liable up to the time of the discharge of their principal;⁹³ but if the discharge is through fraud, neither the principal or surety is relieved from liability.⁹⁴

§ 258. WHEN RIGHT OF ACTION ARISES AGAINST SURETIES.

—It is the general rule that the liability of sureties arises on an administrator's or executor's bond after default of their principal has been fixed, and then only under the terms of the obligation entered into by them.⁹⁵ But in some jurisdictions, generally controlled by statute, it is not essential to a right of recovery on such bond that *devastavit* shall have been established against the administrator or executor.⁹⁶

⁸⁸ Rutter v. Hall, 31 Ill. App. 647.

⁸⁹ Ward v. Tinkham, 65 Mich. 695.

⁹⁰ Howe v. Peabody, 2 Gray, 556.

⁹¹ People v. Lott, 27 Ill. 215.

⁹² Steele v. Graves, 68 Ala. 17. See, also, Veach v. Rice, 131 U. S. 293.

⁹³ Shelton v. Cureton, 3 McCord L. (S. Car.) 412; Potter v. Ogden, 136 N. Y. 384.

⁹⁴ Pollock v. Cox (Ga.), 34 S. E. Rep. 213.

⁹⁵ Grady v. Hughes, 80 Mich. 184; Choate v. Jacobs, 136 Mass. 297; Potter v. Ogden, 136 N. Y. 384; Dawson v. Dawson, 25 Ohio St. 443; Boyd v. Commonwealth, 36 Pa. St. 355.

⁹⁶ Tucker v. People, 87 Ill. 76; State v. Johnson, 7 Blackf. (Ind.) 520; State v. Shelby, 75 Mo. 482; Morgan v. West, 43 Ga. 275; Clarkson v. Commonwealth, 2 J. J. Marsh. 19; Francis v. Northcote, 6 Tex. 185.

Such action may be brought by a creditor of the estate, by a legatee, distributee, or other interested person in the assets who has been injured by the default of the principal.⁹⁷

An administrator *de bonis non* cannot sue at common law on a bond of his predecessor.⁹⁸ But this rule has been changed by statute in some jurisdictions, so now such principal can sue at law his predecessor.⁹⁹

§ 259. SURETIES OF GUARDIAN—GENERAL LIABILITY.—It is the duty of sureties on a guardian's bond to make inquiries and to see that their principal discharges his obligations as guardian, whether he be solvent or insolvent.¹⁰⁰ Because the object of requiring a bond with sureties is to protect the ward from the fraud and dishonesty of his guardian, no less than against his insolvency; to allow the sureties to escape liability from the very fraud of their principal which he was under contract obligation not to commit would be to render such unavailing as a protection to the ward and defeat the purpose of the law in requiring guardians to give bond with security.¹⁰¹

Guardianship is a personal trust. The guardian must exercise at least ordinary and reasonable care, and make the property of the ward productive, and this duty is a personal one, which cannot be delegated, and for the performance of which his sureties are answerable. So the guardianship terminates with the death of the guardian. The duty to account continues and the sureties cannot discharge themselves only by showing that in accordance with the terms of the bond, the principal, during the time the estate was committed to his care, has faithfully administered his trust. They are bound to answer for his mismanagement of the estate up to the time of his death, and to account

⁹⁷ *State v. Scott*, 12 Ind. 529; *Rawson v. Piper*, 36 Me. 98; *Goodkin v. Hoit*, 3 N. H. 392; *Boyle v. St. John*, 28 Hun, 454.

⁹⁸ *Marsh v. People*, 15 Ill. 284; *Lucas v. Donaldson*, 117 Ind. 139; *Douglas v. Day*, 28 Ohio St. 175.

⁹⁹ *Marsh v. People*, 15 Ill. 284; *Palmer v. Pollock*, 26 Minn. 433.

¹⁰⁰ *Forrester v. Steele*, 46 Md. 154.

¹⁰¹ *Gillett v. Wiley*, 126 Ill. 310.

when called upon to do so, for any damages resulting to his ward or his ward's estate in consequence of the mismanagement of the ward's property during the lifetime of the guardian.¹⁰²

If a guardian is appointed by a court without jurisdiction, and gives a bond, and then takes possession of the ward's property, his sureties are liable, as on a voluntary bond, for the assets converted by the guardian.¹⁰³

A guardian and his sureties are accountable for commission of defaults, and for omission of duty. Hence, they are not only liable for money and assets collected and taken possession of by the guardian, but also for money and assets which he could secure by proper or ordinary diligence.¹⁰⁴ If the guardian converts the ward's money to his own use it is a breach of the condition of the bond for which his sureties are responsible.¹⁰⁵

§ 260. GIVING ADDITIONAL SECURITY.—Whenever a second bond is required, not at the instance of the surety on the first, but at the instance of one of the parties, and is intended as a mere additional or cumulative bond, and not subsidiary, no discharge of the surety on the first bond takes place. Such bonds are generally required when additional money is to come to the hands of the guardian, such as pension money or money from another State, or a legacy to the ward.¹⁰⁶ In most jurisdictions where such additional bond is required, the sureties in the new bond are considered as co-sureties with those on the first bond, and equally liable with them for the whole guardianship from its creation.¹⁰⁷ And if there are sureties in different amounts, they are, as between themselves, compellable to contribute in proportion to the penalties of their respective bonds.¹⁰⁸

Thus, under the general rule where a resident guardian is required to give an additional bond for the proceeds coming to

¹⁰² *Garrett v. Reese*, 99 Ga. 494; *Ames v. Dorrok*, 76 Miss. 187.

¹⁰³ *Hazelton v. Douglas*, 97 Wis. 214; *United States v. Tingey*, 5 Pet. 115.

¹⁰⁴ *Ames v. Williams*, 74 Miss. 404.

¹⁰⁵ *Irwin v. Backus*, 25 Cal. 221; *Deegan v. Deegan*, 22 Nev. 185.

¹⁰⁶ *Bush v. State*, 19 Ind. App. 523; *Middleton v. Hensley* (Ky.), 52 S. W. Rep. 974.

his hands from a foreign administrator, the second bond is not subsidiary to the first, but is primary security, like the first, for money received. The giving of the second did not annul the first; both continue, and the two sets of sureties are liable for the guardian's defaults;¹⁰⁹ and such bond is additional and cumulative, and for the entire guardianship, and the obligors are liable for the whole maladministration of the guardian.¹¹⁰ In the absence of affirmative proof to that effect, there can be no presumption that the parties, or either of them, would be benefited by discharging the sureties on the first bond merely because a new bond was required and given.¹¹¹

But there is another class of cases which are not wholly in accord with this doctrine. So it is held that the liability of a surety on a new bond executed by a guardian does not extend to previous defaults of his principal. Thus, where a guardian had converted his ward's money before giving the second bond, the sureties on the latter bond are not liable for such conversion;¹¹² that is, sureties on the second bond are not made liable for past defaults of the principal unless the bond so prescribes or the statute makes them responsible.¹¹³ The surety on the second bond is not liable unless the obligation indicates the assumption of liability for past defalcations.¹¹⁴ But it is held,

¹⁰⁹ *Loring v. Bacon*, 3 Cush. 465; *Forbes v. Harrington*, 171 Mass. 386; *Ammons v. People*, 11 Ill. 6; *State v. Hull*, 53 Miss. 626; *McGlothlin v. Wyatt*, 1 Lea, 717; *Hutchcraft v. Shrout*, 1 Mon. 206; *Brooks v. Whitmore*, 142 Mass. 39; *Stevens v. Tucker*, 87 Ind. 109; *Commonwealth v. Cox*, 36 Pa. St. 442; *Allen v. State*, 61 Ind. 268.

¹¹⁰ *Deering v. Winchester*, 2 Bos. & P. 270, 1 Cox, 318; *Pendlebury v. Walger*, 4 Younge & Coll. 441; *Loring v. Bacon*, 3 Cush. 465; *Jones v. Hays*, 3 Ired. L. (N. Car.) 502; *Jones v. Blanton*, 6 Ired. L. (N. Car.) 115.

¹¹¹ *State v. Mitchell*, 132 Ind. 461; *Baum v. Lyman*, 72 Miss. 932.

¹¹² *Douglass v. Kessler*, 57 Iowa, 63; *Clark v. Wilkinson*, 59 Wis. 543. See, also, *Pinkstaff v. State*, 59 Ill. 148; *Ennis v. Smith*, 4 How. 400. Compare *Sayers v. Cassell*, 23 Gratt. 525.

¹¹³ *Stewart v. Johnson*, 87 Ga. 97.

¹¹⁴ *Lowry v. State*, 64 Ind. 421; *Williams v. State*, 89 Ind. 570.

¹¹⁵ *State v. Jones*, 89 Mo. 470.

¹¹⁶ *Farrar v. United States*, 5 Pet. 374; *United States v. Boyd*, 15 Pet. 206; *State v. Shackelford*, 56 Miss. 648; *Sebastian v. Bryan*, 21 Ark. 447.

if the guardian has in his possession the money converted before the giving of the second bond, the sureties on the second bond are liable for such default.¹¹⁵

In some jurisdictions, periodical statutory bonds are given and required, and such bonds are held to be cumulative under the statute, though contribution should be in inverse order to that of the execution.¹¹⁶

§ 261. GUARDIAN SELLING REAL ESTATE.—In most jurisdictions the general bond does not cover sales made of the ward's real estate. In such case the guardian is required to give a new bond to answer for the proceeds of such sales. The duties of the administrator and guardian are prescribed by statute, and the trust created by their appointment extends only to the duties imposed by statute; and where they file bonds and qualify and take upon themselves the administration of the personal assets of such trusts, the sureties on the bonds filed are liable only for the faithful accounting of such personal assets. So where they apply to and obtain an order of court to sell or rent real estate, and file an additional bond as a condition precedent to such sales or renting, the sureties on such bonds are alone liable for the funds resulting therefrom, and the sureties on the general bond are not liable for such sales.¹¹⁷ The sureties on the first or general bond of the guardian are not liable for real estate sales by a guardian under the second bond.¹¹⁸

And so the sureties on the last bond are liable for failure of their principal to carry out specific objects for which such sale was authorized.¹¹⁹

¹¹⁵ *Parker v. Medsker*, 80 Ind. 155.

¹¹⁶ *Crook v. Hudson*, 4 Lea, 448; *Jamison v. Cosby*, 11 Humph. 273.

¹¹⁷ *Worgang v. Clipp*, 21 Ind. 119; *Kester v. Hill*, 42 W. Va. 611; *People v. Hoffman*, 182 Ill. 390; *Findley*, 42 W. Va. 372.

¹¹⁸ *State v. Peterman*, 66 Mo. App. 257; *Fay v. Taylor*, 11 Met. 529; *Blauser v. Diehl*, 95 Pa. St. 350; *Bunce v. Bunce*, 69 Iowa, 333; *Colburn v. State*, 47 Ind. 310; *Morris v. Cooper*, 35 Kan. 156. Compare *Hart v. Stribling*, 21 Fla. 136.

¹¹⁹ *Mattoon v. Cowing*, 13 Gray, 387; *McKim v. Morse*, 130 Mass. 439.

§ 262. DISCHARGE OF SURETY.—So long as the guardian continues in his official capacity, his sureties can only be discharged from liability by applying to the court and complying with the provisions of the law.¹²⁰ And such discharge dates from the time of the approval of the new bond, when the prior surety's liability ceases as to subsequent acts of the guardian.¹²¹ And the discharge of one surety releases the co-surety unless he remains a surety by consent or agreement.¹²²

§ 263. TERMINATION OF SURETY'S LIABILITY.—The surety's liability terminates when the guardian has faithfully discharged his duties and made an accounting to the proper court and been released. But the sureties' liability is not discharged by the expiration of the guardianship until a final settlement and proper accounting;¹²³ nor is the liability extinguished by the death of the surety, for then his estate is responsible in his place,¹²⁴ and his representatives must be made a party to a suit.¹²⁵ And unless there is a statute controlling the time to bring suit,¹²⁶ the liability of the surety continues against him and his personal representatives until the statute of limitations, as in other cases, bars the action on the bond.¹²⁷ And the limitation begins to run from the time when the guardian settles his account in the proper court, and not from the date of his informal accounting with the ward; the law directs that it be reckoned from the guardian's discharge.¹²⁸ The liability is limited to what the guardian has legally done with diligence during his term of office and not for anything done thereafter.¹²⁹

¹²⁰ *Rush v. State*, 19 Ind. App. 523.

¹²¹ *Hammond v. Beasley*, 15 Lea, 618; *Dempsey v. Fenno*, 16 Ark. 491; *State v. Page*, 62 Ind. 209.

¹²² *Tyner v. Hamilton*, 51 Ind. 250; *Frederick v. Moore*, 13 B. Mon. 470; *Spencer v. Houghton*, 68 Cal. 82.

¹²³ *Yost v. State*, 80 Ind. 330; *Higgins v. State*, 87 Ind. 282.

¹²⁴ *Voris v. State*, 47 Ind. 345.

¹²⁵ *Lynch v. Rotan*, 39 Ill. 14.

¹²⁶ *State v. Hughes*, 15 Ind. 104; *Loring v. Alline*, 9 Cush. 68.

¹²⁷ *Bonham v. People*, 102 Ill. 434; *Ragland v. Justices*, 10 Ga. 65.

¹²⁸ *Marlow v. Lacy*, 68 Tex. 154; *Nunnery v. Day*, 64 Miss. 457.

¹²⁹ *Ordinary v. Smith*, 55 Ga. 15.

Thus, money paid to the guardian after the ward reaches his majority, does not make the surety liable for any malfeasance of such discharged guardian.¹³⁰

§ 264. WHEN ACTION UPON THE BOND ACCRUES.—The general rule is that action cannot be brought upon the bond until the amount of the guardian's liability has been ascertained by a court of competent jurisdiction at his final settlement.¹³¹ But this general rule has been changed in many jurisdictions, and whenever the condition of the bond is violated, suit may be brought on such bond and prosecuted to final judgment against the guardian or sureties on his bond, without first obtaining judgment against the guardian alone.¹³²

§ 265. ESTOPPEL BY JUDGMENT AGAINST PRINCIPAL.—An order from the probate court finding the amount due from the guardian to the ward is conclusive upon the guardian and his sureties on the bond, and can only be impeached for fraud or mistake.¹³³ The general rule is that the surety is concluded by the judgment against his principal.¹³⁴ However, in some States such judgment is only conclusive against the guardian, and *prima facie* only against the surety.¹³⁵

A settlement with the ward after he reaches his majority, if it

¹³⁰ Chapin v. Livermore, 13 Gray, 561; Commonwealth v. Pray, 125 Pa. St. 542.

¹³¹ Perkins v. Stimmel, 114 N. Y. 359; Gillespie v. See, 72 Iowa, 345; Disbee v. Gleason, 21 Neb. 534; Murray v. Wood, 144 Mass. 195; Shollenberger's Appeal, 21 Pa. St. 337; Forrester v. Vason, 71 Ga. 49; Kugler v. Prien, 62 Wis. 248.

¹³² Bonham v. People, 102 Ill. 434; State v. Slevin, 93 Mo. 253; Wolfe v. State, 59 Miss. 338; Call v. Rufin, 1 Call (Va.), 333; Sage v. Hammonds, 27 Gratt. 651.

¹³³ Ryan v. People, 165 Ill. 143; Gillett v. Wiley, 126 Ill. 310; Martin v. Porter, 32 App. Div. 602; Jacobson v. Anderson, 72 Minn. 426.

¹³⁴ Commonwealth v. Julius, 173 Pa. St. 322; Deegan v. Deegan, 22 Nev. 185; Commonwealth v. Rhoads, 37 Pa. St. 60; Botkin v. Kleinschmidt, 21 Mont. 1; Braiden v. Mercer, 44 Ohio St. 339.

¹³⁵ State v. Hull, 53 Miss. 626; Weaver v. Thornton, 63 Ga. 655.

be fair and full, is sufficient to satisfy the bond,¹³⁶ though such settlement may be attacked by the sureties.¹³⁷

§ 266. ESTOPPEL BY RECITALS IN THE BOND.—Sureties upon a guardian's bond are bound by the recitals in the instrument, and are estopped to deny that their principal had in fact been appointed guardian of the ward.¹³⁸ Because by executing the bond the sureties obtain for their principal the possession and control of the ward's property, and cannot therefore be permitted to escape liability to account for him if necessary, by denying the recitals in the bond.¹³⁹ Although the appointment is irregular, being made in the wrong county, the principal and sureties are estopped by the recitals in the bond to raise the objections that the bond is illegal.¹⁴⁰

§ 267. JOINT GUARDIANS.—In case two or more guardians are jointly appointed for the same ward, and execute a joint bond for the faithful performance of their trust, each of them is security upon the bond for the other, and both they and their sureties upon the bond are responsible for *devastavit* committed by either.¹⁴¹ And one of the joint guardians may bring suit against the sureties on the joint bond for a default of his co-guardian and recover the full amount of the damages caused by such maladministration, from the sureties;¹⁴² and the sureties have their remedy against such plaintiff or principal, in his individual capacity, for indemnity.¹⁴³

§ 268. JOINT BOND INSTEAD OF SEVERAL.—The bond given

¹³⁶ *Davenport v. Olmstead*, 43 Conn. 67.

¹³⁷ *State v. Hostes*, 61 Mo. 544.

¹³⁸ *Bray v. State*, 78 Ind. 68; *Havenstein v. Gillespie*, 73 Miss. 742; *Norton v. Miller*, 25 Ark. 108; *Iredel v. Barbee*, 9 Ired. L. (N. Car.) 230; *Fridge v. State*, 3 Gill & J. (Md.) 103; *Shroyer v. Richmond*, 16 Ohio St. 455; *Hines v. Mullins*, 25 Ga. 696; *Williamson v. Woodman*, 73 Me. 163.

¹³⁹ *Shroyer v. Richmond*, 16 Ohio St. 455; *Fridge v. State*, 3 Gill & J. 103.

¹⁴⁰ *Norton v. Miller*, 25 Ark. 108.

¹⁴¹ *Freeman v. Brewster*, 93 Ga. 648.

¹⁴² *Boyle v. St. John*, 28 Hun, 454; *Sperb v. McCoun*, 110 N. Y. 605.

¹⁴³ *Boyle v. St. John*, 28 Hun, 454; *Sperb v. McCoun*, 110 N. Y. 605.

by the guardian will be enforced so far as it is consistent with the policy of the law, though it does not conform to it. Thus, a guardian's bond securing the estates of two or more minors in joint form and particularizing the duties to be performed by the guardian, is valid, though not in conformity with the statute.¹⁴⁴ So where the guardian of several minors gives but one bond, the sureties cannot escape liability in an action on the bond on the ground that it is not such a bond as the law requires, in that it is joint instead of several as to the obligees.¹⁴⁵

§ 269. EXTENT OF SURETY'S LIABILITY.—Of course the sureties may be bound to the extent of the penalty. But the recovery on the bond may so far exceed the amount of the penalty as is necessary to cover interest upon the penalty from the date of the breach.¹⁴⁶ Because when the surety neglects to discharge the liability against him, it is but reasonable that he should compensate the obligee for delay by paying legal interest from such date.¹⁴⁷

§ 270. REVIVAL OF LIABILITY BY SURETY.—At common law a verbal acknowledgment is sufficient to revive a liability barred by the statute of limitations.¹⁴⁸ So where the statute does not deny the right to revive by a verbal promise, a surety on a guardian's bond can revive his liability by a verbal promise, that he will pay whatever fund is due from the guardian. The duty rests upon a surety to see that his principal performs the contract, and the guaranty subsists as a moral obligation after the statute of limitations has run against the right to enforce it, which obligation will support a new promise by the surety to answer for the principal's default.¹⁴⁹

§ 271. RECEIVER'S BOND—LIABILITY OF SURETIES.—There

¹⁴⁴ *Ordinary v. Heishon*, 42 N. J. L. 15.

¹⁴⁵ *Deegan v. Deegan*, 22 Nev. 185; *Pursley v. Hayes*, 22 Iowa, 11.

¹⁴⁶ *James v. State*, 65 Ark. 415.

¹⁴⁷ *Brainard v. Jones*, 18 N. Y. 35; *Wyman v. Robinson*, 73 Me. 384.

¹⁴⁸ *Perkins v. Cheney*, 114 Mich. 567.

¹⁴⁹ *Perkins v. Cheney*, 114 Mich. 567.

must be an accounting, settling the receiver's account, before an action upon his bond can be instituted.¹⁵⁰ After the account is adjudged and approved by the court, and the receiver is ordered to pay the fund in his hands into court, or to the person entitled thereto, a failure to comply with such order renders himself and his sureties liable.¹⁵¹

If, however, the receiver dies and it thus becomes impossible to pursue the ordinary course against him, then the remedy is against the sureties on the bond.¹⁵²

§ 272. RIGHT OF ACTION AGAINST SURETY ON RECEIVER'S BOND.—The liability of sureties on a receiver's bond can generally be enforced only by action on the bond in a common law court, where they can make defense on trial by a jury.¹⁵³ So where the creditors institute proceedings by the common law action of debt to recover their claims and obtain an order for their payment, a mere summary order to show cause cannot be enforced though no defense was made, as the suit must be tried.¹⁵⁴ The sureties cannot be summarily proceeded against by an order of court to show cause, unless they have a part of the trust fund in their hands, and then only to the extent of such funds.¹⁵⁵ Where judgment has been recovered against a receiver he is not a necessary party to an action against his sureties on the bond.¹⁵⁶ The annulment of the appointment of a receiver who has acted does not release his sureties from liability.¹⁵⁷ But he nor his sureties are liable on his bond for property not coming under its provisions.¹⁵⁸

¹⁵⁰ *State v. Gibson*, 21 Ark. 146; *Bank v. Creditors*, 86 N. Car. 323; *Atkinson v. Smith*, 89 N. Car. 72; *French v. Dauchy*, 57 Hun, 100.

¹⁵¹ *Bank v. Creditors*, 86 N. Car. 323; *Ludgater v. Cannell*, 3 Man. & Gr. 174.

¹⁵² *Weems v. Lathrop*, 42 Tex. 207; *French v. Dauchy*, 57 Hun, 100; *Ludgater v. Cannell*, 3 Man. & Gr. 175.

¹⁵³ *Thurman v. Morgan*, 79 Va. 367.

¹⁵⁴ *Nutton v. Isaacs*, 30 Gratt. 740; *Black v. Gentry*, 119 N. Car. 502.

¹⁵⁵ *Bank v. Creditors*, 86 N. Car. 323; *Liedenback v. Denklespiel*, 11 Lea, 297; *Atkinson v. Smith*, 89 N. Car. 72.

¹⁵⁶ *Black v. Gentry*, 119 N. Car. 502.

¹⁵⁷ *Thompson v. Denner*, 16 App. Div. 160.

¹⁵⁸ *Ayers v. Hite* (Va.), 34 S. E. Rep. 44.

§ 273. WHEN SURETY IS CONCLUDED BY DECREE OF COURT.—After due proceedings and full hearing by the court, a decree made against the receiver is competent evidence both of a breach of the bond and of the amount, for which the sureties are liable.¹⁵⁹ If the receiver is entitled to compensation, and the amount is afterwards ascertained, his sureties may petition the court to have the amount applied to their indemnity,¹⁶⁰ but such amount cannot be considered until determined.¹⁶¹ To be concluded by an accounting in chancery the surety must have due notice of such litigation.¹⁶² If the receiver's bond is for the future the surety cannot be made liable for the past acts for which he has not covenanted.¹⁶³ Sureties are not liable for any defaults or misconduct of the receiver prior to the execution of the bond where the undertaking is that the receiver shall "henceforth" faithfully discharge his duties.¹⁶⁴

§ 274. FUNDS COMING INTO THE HANDS OF THE RECEIVER.—Where funds have been paid to a receiver within the scope of his duties, his sureties are liable for the misappropriation of such funds. Thus, the receiver's omission to pay to himself as receiver money which he had borrowed of the company for which he is receiver before his appointment, is a breach of his bond, for which his sureties are liable.¹⁶⁵ So where a receiver collects notes a failure to account makes his sureties liable for the amount collected.¹⁶⁶ Wherever the money received cannot be recovered back, his sureties are liable for his misconduct.¹⁶⁷

§ 275. GIVING A NEW BOND.—By giving a new bond it does

¹⁵⁹ Commonwealth v. Gould, 118 Mass. 300.

¹⁶⁰ Brandon v. Brandon, 3 DeG. & J. 524.

¹⁶¹ Commonwealth v. Gould, 118 Mass. 300.

¹⁶² Ball v. Chancellor, 47 N. J. L. 125.

¹⁶³ Thompson v. MacGregor, 81 N. Y. 592.

¹⁶⁴ Bissell v. Saxton, 66 N. Y. 60; Rochester v. Randall, 105 Mass. 295; Vivian v. Otis, 24 Wis. 518.

¹⁶⁵ Commonwealth v. Gould, 118 Mass. 300.

¹⁶⁶ Weems v. Lathrop, 42 Tex. 207.

¹⁶⁷ Wilde v. Baker, 14 Allen, 349.

not necessarily discharge the sureties on the prior bond. So an order of court made at the instance of one of the parties to the action for which a receiver is appointed, requiring a new bond, in the same sum and condition of his existing bond, will not operate to discharge the sureties on the old bond. It is an additional or cumulative bond, and is not substituted for the first.¹⁶⁸

§ 276. **EXTENT OF SURETY'S LIABILITY.**—The extent of the liability of a surety of a receiver can only be ascertained by the terms of the bond.¹⁶⁹ Thus, where the engagement of a surety is for the future, he cannot be held liable for the past as to which he has not covenanted.¹⁷⁰ As between the principal and the creditors of the fund which is the receiver's duty to pay according to the order of the court, if he has been heard, he is bound by the adjudication. As between the surety and such creditors, it is not the receiver's duty to pay according to an order made without the surety's knowledge as to which he has not been heard and which is not against him a binding adjudication. Hence, a judgment against the principal cannot be binding upon the surety only as evidence unless by the terms of the bond the surety contracts to be bound by the adjudication against his principal.¹⁷¹

Whether a surety is liable for interest on the penalty after breach is in the discretion of the court upon the consideration of all the facts and circumstances.¹⁷² The surety is liable for the costs for which the receiver is liable.¹⁷³

§ 277. **LIABILITY OF SURETY ON ASSIGNEE'S BOND.**—The liability of a surety on an assignee's bond will depend upon the

¹⁶⁸ *Stewart v. Johnston*, 87 Ga. 97.

¹⁶⁹ *Ross v. Williams*, 11 Heisk. 410.

¹⁷⁰ *Bissell v. Saxton*, 66 N. Y. 60; *United States v. Giles*, 9 Cranch, 212; *Farrar v. United States*, 5 Pet. 373.

¹⁷¹ *Thomson v. MacGregor*, 81 N. Y. 592. See, also, *Scofield v. Churchill*, 72 N. Y. 565.

¹⁷² *In re Herrick's Minors*, 3 Ir. Ch., N. S. 183. See, also, *Dawson v. Raynes*, 2 Russ. 466; *State v. Blakemore*, 7 Heisk. 657.

¹⁷³ *Mannsell v. Egan*, 8 Ir. Eq. 372; 9 Ir. Eq. 283.

terms of the bond, and will not be extended by construction.¹⁷⁴ And when the bond is a good common-law bond, and not contrary to statute or public policy, it will be valid against the assignee and his sureties,¹⁷⁵ though not wholly complying with the statute. The sureties are liable for the proper administration of the funds which come into the hands of the assignee;¹⁷⁶ their liability is the same as the assignee in the scope of his duties.¹⁷⁷

§ 278. ESTOPPEL OF SURETY.—The sureties on the bond of an assignee are concluded by the finding of the court as to the amount to be accounted for by the receiver.¹⁷⁸ The final decree of the court upon a full hearing concludes the sureties on the assignee's bond, as to a collateral attack,¹⁷⁹ but the surety may appeal from the order of the court, but such order cannot be attacked collaterally.¹⁸⁰

§ 279. GIVING NEW BOND.—If the court upon satisfactory grounds requires a new bond to be given by the assignee, this does not release the sureties on the old bond. Thus, a court finding the assignee in insolvency proceedings is disposing of the funds of the estate without the order of the court, and being satisfied that the sureties on the assignee's bond are insolvent, may require an additional bond to be given, which will only be cumulative.¹⁸¹ And when the new bond requires that the assignee shall obey the orders of the court "previously and subsequently" entered, the sureties on the new bond are liable upon the assignee's failure to obey an order of the court requiring him to account for funds of the estate which he had paid out without

¹⁷⁴ *Ward v. Stahl*, 81 N. Y. 406; *Van Slyke v. Bush*, 123 N. Y. 47; *Moulding v. Wilhartz*, 67 Ill. App. 659; 169 Ill. 422.

¹⁷⁵ *Andrews v. Ford*, 106 Ala. 173.

¹⁷⁶ *Van Slyke v. Bush*, 123 N. Y. 47.

¹⁷⁷ *Patterson's Appeal*, 48 Pa. St. 342.

¹⁷⁸ *Moulding v. Wilhartz*, 169 Ill. 422; *Little v. Commonwealth*, 48 Pa. St. 337.

¹⁷⁹ *Stelle's Case*, 34 N. J. Eq. 199; *Garner v. Tisinger*, 46 Ohio St. 56.

¹⁸⁰ *Moulding v. Wilhartz*, 169 Ill. 422.

¹⁸¹ *Moulding v. Wilhartz*, 169 Ill. 422.

authority before the new bond was executed, though this proviso is not a condition of the statutory bond.¹⁸²

§ 280. **DEFAULT OF ASSIGNEE.**—A failure to comply with the order of the court makes the assignee and his sureties liable upon the bond.¹⁸³ A mere failure of a creditor to use due diligence in collecting a claim from the assignee cannot relieve the surety;¹⁸⁴ even if the assignee has become insolvent during the delay of the creditor, the surety is not released.¹⁸⁵ If a judgment declares an assignment void as to certain creditors, then they cannot hold the sureties of the assignee liable for such funds as are covered by the judgment, because sureties can be charged only when the case is brought within the terms of their contract, which cannot be extended by construction to embrace purposes and objects not contemplated by the parties.¹⁸⁶

§ 281. **DISCHARGE OF SURETY.**—An assignee and his sureties can be discharged judicially only upon a regular proceeding for an accounting, and the payment of the fund according to the final order of the court,¹⁸⁷ although the creditors have consented to a composition, and the accounting may be wholly formal.¹⁸⁸ Under the Ohio statute the sureties on the bond of an assignee who has failed to pay the fund over as ordered are not joint debtors. So a compromise to release one surety will not discharge the others. They will be liable for their proportionate share of the debt against the assignee.¹⁸⁹

¹⁸² *Moulding v. Wilhartz*, 169 Ill. 422.

¹⁸³ *Oppenheimer v. Hamrick*, 86 Iowa, 585.

¹⁸⁴ *Taylor v. State*, 73 Md. 208.

¹⁸⁵ *People v. White*, 28 Hun, 289.

¹⁸⁶ *People v. Chalmers*, 60 N. Y. 154, distinguishing *People v. Vilas*, 36 N. Y. 459.

¹⁸⁷ *In re Merwin*, 10 Daly, 13; *In re Loventhal*, 10 Daly, 14.

¹⁸⁸ *In re Yeager*, 10 Daly, 7; *In re Dryer*, 10 Daly, 8.

¹⁸⁹ *Walsh v. Miller*, 51 Ohio St. 462.

CHAPTER XI.

BONDS OF PRIVATE OFFICERS AND AGENTS.

§ 282. DURATION OF SURETY'S LIABILITY.—A surety's liability on a private official bond is generally limited to a certain time, after which he is not liable for defaults of the principal. Thus, when the bond is an annual one, the obligors are only bound for defaults that occur during the year for which the bond was given. And even in cases where the officer is authorized to hold over his term and until his successor is elected and qualified, the liability on the official bond is not extended beyond the duration of the term. And where an officer is chosen for a term of limited duration, and a bond for the faithful performance of his duties is given, the presumption is that the sureties only contracted for faithfulness of the officer during that time; and the obligation of the sureties is not extended by the mere fact that such officer is re-elected, or for any reason holds over the term.¹

And where the appointment of an agent of a corporation is temporary, and a right to revoke the appointment being reserved, and no time specified for its duration, the liability of the surety only continues until the appointment is revoked.² Where two corporations become consolidated by law, the surety on the bond before consolidation is liable for a breach committed after the amalgamation of the two corporations.³

§ 283. CONTINUING LIABILITY OF SURETY.—Many bonds are drawn binding the surety during the time of the principal's continuance in office and until his successor is elected and qualified.

¹ *Cincinnati, etc., R. R. Co. v. Morrell*, 11 Heisk. 715; *Walch v. Seymour*, 28 Conn. 387; *Wappello v. Bigham*, 10 Iowa, 39; *Raney v. The Governor*, 4 Blackf. (Ind.) 2; *Life Association v. Lemke*, 40 Kan. 661; *Manufacturers, etc., Co. v. Odd Fellows Asso.*, 48 Pa. St. 446; *People v. Toomey*, 122 Ill. 306. Compare *Amherst Bank v. Root*, 2 Met. 522; *Exeter Bank v. Rogers*, 7 N. H. 21.

² *Mobile, etc., R. R. Co. v. Brewer*, 76 Ala. 135.

³ *Eastern, etc., R. R. Co. v. Cochrane*, 23 L. J. N. S. 61.

But such bond does not bind the surety beyond the period of his first election and such further time as is reasonably sufficient for the election and qualification of the principal's successor, the office being by statute an annual one. The principal's re-election from time to time does not charge the sureties; and the statutory provision that the principal when elected shall hold his office until another is chosen and qualified in his stead, does not extend the surety's liability to subsequent elections of the same principal.⁴

§ 284. RESTRICTION OF SURETY'S LIABILITY BY RECITALS IN THE BOND.—The liability of the sureties may be restricted by recitals in the term of office in the bond itself.⁵ So where it appears by the records of a corporation that the office by the regulation of the corporation is an annual one, the bond should be restricted, which will control the surety's liability.⁶ So when the recitals in a bond are that one has been appointed to an office for a limited time, it will restrict the liability of the sureties.⁷

§ 285. AS TO THE SCOPE OF THE OFFICER'S EMPLOYMENT.—A surety cannot be held bound for a longer time than that limited by his undertaking, and such undertaking as against the surety is to be strictly construed.⁸ The surety does not undertake to be liable for anything beyond the letter of his contract, and is only liable within its terms.⁹ But, whether the principal is acting within the scope of his employment or not, his sureties are liable, provided the default was a breach of the condition of his bond. Thus, the sureties on a bond of a bank messenger are liable for moneys stolen from the bank by the messenger, whether he was acting within the scope of his employment or not,

⁴ *Lexington, etc., R. R. Co. v. Elwell*, 8 Allen, 371; *Middlesex Manuf. Co. v. Lawrence*, 1 Allen, 339.

⁵ *Arlington v. Merricke*, 2 Sand. 411; *Liverpool Water Works v. Atkinson*, 6 East, 507.

⁶ *Dedham Bank v. Chickering*, 3 Pick. 335.

⁷ *Lexington, etc., R. R. Co. v. Elwell*, 8 Allen, 371.

⁸ *Mullikin v. State*, 7 Blackf. (Ind.) 77.

⁹ *Detroit Sav. Bank v. Ziegler*, 49 Mich. 157.

as the theft was a breach of the condition of his bond, conditioned to conduct himself honestly and faithfully.¹⁰ So, under like condition of bond the sureties are liable if a cashier transcends the known powers of his office by changing the securities of the bank without its knowledge and losses accrue by the abuse of his trust.¹¹ So, also, the appropriation by the bookkeeper of the bank's money, and making fraudulent entries to avoid detection is a breach of the bond conditioned for his honesty, and the sureties are liable.¹² But if the sureties sign a bond for a specific business, they are not liable for the principal's defaults in another business entirely foreign to their undertaking.¹³

While the liability of a surety is not to be extended by implication beyond the terms of the contract by which his responsibility is to be measured, yet a bond constituting a contract must have such construction given to it as to carry out the intention of the parties thereto, and in this respect there is no difference between such contract and any other.¹⁴ And the provisions of the statutes, in a statutory bond, will not be read into the bond, thereby adding new terms to it.¹⁵

§ 286. INCREASE OF CAPITAL STOCK OF CORPORATION.—It is the established rule of law that a party to a contract is not bound beyond the extent of his engagement, which appears from the terms of the contract and the nature of the transaction to have been in his contemplation at the time of entering into it, and that his liability cannot without his consent be extended or en-

¹⁰ *German Am. Bank v. Uruth*, 87 Pa. St. 419.

¹¹ *Barrington v. Bank*, 14 Serg. & R. 405.

¹² *Rochester City Bank v. Elwood*, 21 N. Y. 88; *Minor v. Bank*, 1 Pet. 46; *United States v. Boyd*, 15 Pet. 187.

¹³ *Blair v. Ins. Co.*, 10 Mo. 559.

¹⁴ *Strawbridge v. Railroad Co.*, 14 Md. 360; *Rochester City Bank v. Elwood*, 21 N. Y. 88; *Barrington v. Bank*, 14 Serg. & R. 405; *Minor v. Bank*, 1 Pet. 41; *Magee v. Ins. Co.*, 92 U. S. 93; *Engles v. Ins. Co.*, 46 Md. 322; *German Am. Bank v. Auth*, 87 Pa. St. 419; *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226; *Detroit Sav. Bank v. Ziegler*, 49 Mich. 157; *Melville v. Dodge*, 6 M. G. & S. 450.

¹⁵ *Howard Co. v. Hill*, 88 Md. 111. Compare *State v. Rubber Mfg. Co.*, 150 Mo. 181.

larged either by the obligee or by the operation of law.¹⁶ So the sureties on a cashier's bond, in which they undertake to save the bank harmless from every loss that may arise from the cashier's mistakes as well as from losses arising from his fraud, inattention or negligence in the performance of his duties, are exonerated by the increase of the capital stock of the bank, after the making of the bond, for liability for acts of the cashier after the additional capital had been paid in. Because it increases the risk for greater losses that may occur through malfeasance of the cashier.¹⁷ But this doctrine is not accepted by all the courts. Thus, it is held that the sureties are not released by the increase of capital stock, as it does not increase the liability of the sureties or the duties of the principal.¹⁸ And so the increase of the capital stock by virtue of a statute passed after the making of the cashier's bond, will not discharge the sureties on such bond.¹⁹ The reason for this last rule is that there is no change in the office; that the duties of the office remain the same, and that the increase of business is fairly contemplated by the bond looking at the character of the position which the principal holds.²⁰ Thus, where the sureties on a bond of the principal whose obligation to perform all the duties of a ticket agent for a railroad, embracing those which are or may be imposed upon him under the present appointment or any future appointment, they are not released because, after his appointment, the capital stock of the corporation is increased.²¹

¹⁶ *Miller v. Stewart*, 9 Wheat. 702; *Northwestern Railway Co. v. Whinary*, 10 Exch. 77; *Bamford v. Iles*, 3 Exch. 280; *Banor v. Macdonald*, 3 H. L. Cas. 226.

¹⁷ *Grocers Bank v. Kingman*, 16 Gray, 473.

¹⁸ *Bank v. Wollaston*, 3 Harr. (Del.) 90. But in this case the bond was not conditioned against losses, occasioned by the cashier's mistake.

¹⁹ *Morris Canal v. Van Vorst*, 21 N. J. L. 100; *Lionberger v. Krieger*, 88 Mo. 160.

²⁰ *Strawbridge v. Railroad Co.*, 14 Md. 360; *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226.

²¹ *Eastern R. R. Co. v. Loring*, 136 Mass. 381. In comparing this case with *Grocers Bank v. Kingman*, 16 Gray, 473, the court says there is no close analogy between the duties and responsibilities of a cashier of a bank and those of a ticket seller of a railroad company. The former is

§ 287. **DISCHARGE OF SURETY BY FRAUD.**—Persons asked to become sureties on a bond for the good conduct and fidelity of an officer have the right to be treated with perfect good faith. If the corporation knows of a secret fact materially increasing the risk of the surety, the surety is entitled to have the fact disclosed to him, an opportunity being present to do so. If the surety is deceived by misrepresentation and concealment by the corporation, or obligee, he will be released.²² To accept a surety known to be acting upon a belief that there are no unusual circumstances by which his risk will be materially increased while the party thus accepting knows that there are such circumstances, will release the surety, if the obligee has a suitable opportunity to make such disclosure.²³ Thus, where a bank fraudulently conceals that a teller was a defaulter, and thereby procures persons to go on his bond, such sureties are not liable for subsequent defaults.²⁴ But if the sureties are misled by the principal, and the obligee knows nothing of the fraud perpetrated upon the sureties, they will not be released.²⁵

It is held by some courts that a mere concealment by the obligee will not release the surety.²⁶ But, in any case, the obligee is only bound to give information of such facts as are absolutely known. He is not bound to disclose mere rumors.²⁷

more directly affected by an increase of the capital stock of the corporation than the latter. Moreover, in that case the sureties were bound for losses that might arise from the cashier's mistakes, as well as from his fraud, inattention or negligence in the performance of his duties. "That decision is not authority for the present case." See, also, *Strawbridge v. Railroad Co.*, 14 Md. 360.

²² *Maltby's Case*, 1 Dow. P. Cas. 294; *Graves v. Bank*, 10 Bush, 23.

²³ *Franklin Bank v. Cooper*, 36 Me. 179; *Dinsmore v. Tidhall*, 34 Ohio St. 411; *Aetna Life Ins. Co. v. Mabbett*, 18 Wis. 668.

²⁴ *Wayne v. Bank*, 52 Pa. St. 343.

²⁵ *Western, etc., Ins. Co. v. Clinton*, 66 N. Y. 326; *Magee v. Ins. Co.*, 92 U. S. 93; *Casoni v. Jerome*, 58 N. Y. 315; *McWilliams v. Mason*, 31 N. Y. 294; *Atlas Bank v. Brownell*, 9 R. I. 168; *Bostwick v. Van Voorhis*, 91 N. Y. 353.

²⁶ *Aetna Life Ins. Co. v. Mabbett*, 18 Wis. 668; *Atlantic, etc., Tel. Co. v. Barnes*, 64 N. Y. 385.

²⁷ *State v. Atherton*, 40. Mo. 209.

§ 288. BOND COVERING PRIOR AND SUBSEQUENT DEFAULTS.—If the sureties become liable for prior as well as future defaults of the principal, they will not be liable if their names were procured by the obligee with fraudulent intent who knew that the principal had defaulted in the past of which the sureties were ignorant, with an opportunity to communicate such defaults.²⁸ Misrepresentation or concealment of any material part of the transaction will avoid the contract of suretyship.²⁹

Still, as a matter of law, it is not a fraud upon the sureties that the principal was behind in his accounts at the time he gave his bond of indemnity, and no notice of such default was communicated to the sureties.³⁰ Because intent is the gist of the fraud, and this must be made to appear on the part of the obligee.³¹ So a surety on the bond of a cashier of a bank is not discharged by the mere fact that the cashier was, at the time the bond was made, a defaulter. Nor will the negligence of the bank to ascertain that fact discharge the surety.³²

§ 289. PRINCIPAL HIS OWN SUCCESSOR.—When the principal becomes his own successor, and at the commencement of the second term makes a report of moneys in his hands and gives a new bond for paying over such moneys, his sureties on the second bond are liable for the amount so reported, though he did not, in fact, have that amount.³³ They are liable for any amount which appears to have been in the hands of the principal at the end of the preceding official term as set forth in his report.³⁴

²⁸ *Franklin Bank v. Cooper*, 36 Me. 179; 29 Me. 542; *Franklin Bank v. Stevens*, 39 Me. 532.

²⁹ *Franklin Bank v. Stevens*, 39 Me. 532.

³⁰ *Roper v. Sangamon Lodge*, 91 Ill. 518; *Pittsburg, etc., R. R. Co. v. Shaeffer*, 59 Pa. St. 350; *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85; *Taft v. Gifford*, 13 Met. 187. *Wilmington, etc., R. R. Co. v. Ling*, 18 S. Car. 116.

³¹ *Atlas Bank v. Brownell*, 9 R. I. 168; *Roper v. Sangamon Lodge*, 91 Ill. 518.

³² *Bowne v. Bank*, 45 N. J. L. 361; *Tapley v. Martin*, 116 Mass. 275; *Wayne v. Bank*, 52 Pa. St. 343; *Home Ins. Co. v. Holway*, 55 Iowa 571.

³³ *Roper v. Sangamon Lodge*, 91 Ill. 518.

³⁴ *Morley v. Metamora*, 78 Ill. 294.

§ 290. CONTINUING PRINCIPAL IN OFFICE AFTER KNOWN DEFAULTS.—Continuing the principal in office after his defaults are known, without notice to the surety, does not discharge him, no fraud or dishonesty being shown on the part of the employer.³⁵ Because it is the business of the surety to see that his principal performs the duty which the surety has guaranteed, and not the obligee.³⁶ So where the agent is bound by by-laws of a corporation to render his accounts monthly, but fails to do so for several months, and his sureties are not informed of the defaults by the obligee for some time thereafter, it does not discharge the sureties.³⁷

§ 291. DELINQUENCY OF OBLIGEE.—The obligee owes no duty of active diligence to take care of the interest of the surety. It is the business of the surety to see that his principal performs the duty which he has guaranteed, and not that of the obligee, or creditor.³⁸ The surety is bound to inquire himself and cannot complain that the obligee does not notify him of the state of the accounts. Mere inaction of the obligee will not discharge the surety unless it amounts to a fraud or concealment.³⁹ Nor will the fact that the obligee neglects to ascertain that the principal was a defaulter before giving the bond, discharge the surety.⁴⁰

§ 292. FAILURE TO DISCHARGE DELINQUENTS.—Sureties are not discharged from subsequent liability by the omission on the part of the obligee to notify them of the default of their prin-

³⁵ *Atlantic, etc., Tel. Co. v. Barnes*, 64 N. Y. 385; *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85.

³⁶ *Wright v. Simpson*, 6 Ves. 714; *Tapley v. Martin*, 116 Mass. 275.

³⁷ *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85; *Pittsburg, etc. R. R. Co. v. Shaeffer*, 59 Pa. St. 350; *Taylor v. Bank*, 2 J. J. Marsh. 564; *Bush v. Critchfield*, 4 Ohio, 736; *McKenzie v. Ward*, 58 N. Y. 541; *Winthrop v. Soule* (Mass.), 56 N. E. Rep. 575.

³⁸ *Atlas Bank v. Anthony*, 18 Pick. 238.

³⁹ *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85; *Batchelor v. Bank*, 78 Ky. 435; *McTaggart v. Watson*, 3 Cl. & F. 536; *Amherst Bank v. Root*, 2 Met. 522; *Atlas Bank v. Brownell*, 9 R. I. 168; *Morris Canal v. Van Vorst*, 21 N. J. L. 100; *Bayne v. Bank*, 52 Pa. St. 343.

⁴⁰ *Bowne v. Bank*, 45 N. J. L. 360; *Tapley v. Martin*, 116 Mass. 275; *Wayne v. Bank*, 52 Pa. St. 343.

principal known to the obligee, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the principal.⁴¹ If the sureties are released by acts of the obligee in any cases, they are still bound for prior defaults of their principal.⁴²

As a general rule sureties are not relieved from liability for moneys for which the principal has failed to account, where it does not appear that the moneys were embezzled or the obligee wrongfully and fraudulently concealed from the sureties the neglect and irregularity of the officer in the performance of his official duties.⁴³ But where the principal embezzles the money of the obligee who fraudulently conceals the fact from the sureties, then they are released and not liable for subsequent defalcations.⁴⁴

§ 293. FAILURE TO NOTIFY SURETY OF DEFAULT.—The sureties on a bond are not entitled to notice of the principal's default, nor need any demand be made upon them before action brought on the bond.⁴⁵ Mere laches of the obligee unaccompanied by fraud will not discharge the sureties. So, where the obligee delays for a long time to notify the sureties of the principal's default, or to prosecute on the bond it will not discharge the sureties.⁴⁶ To avoid a bond of a cashier on the ground of

⁴¹ *Harrisburg v. Guiles*, 192 Pa. St. 191; *Atlantic, etc., Tel. Co. v. Barnes*, 64 N. Y. 385; *Pittsburg, etc. R. R. Co. v. Shaeffer*, 59 Pa. St. 350; *Gradle v. Hoffman*, 105 Ill. 147. Compare *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Sanderson v. Aston*, L. R. 8 Exch. 73; *Burgess v. Eve*, L. R. 13 Eq. 450; *Montague v. Tidcombe*, 2 Vern. 518; *Mases v. United States*, 166 U. S. 571.

⁴² *State Bank v. Chetwood*, 8 N. J. L. 1.

⁴³ *Harrisburg v. Guiles*, 192 Pa. St. 191; *Bostwick v. Van Voorhis*, 91 N. Y. 353; *Independent School Dist. v. Hubbard* (Iowa), 81 N. W. Rep. 241; *Tapley v. Martin*, 161 Mass. 275; *Home Ins. Co. v. Gow*, 59 Pa. St. 685; *Wade v. Mt. Sterling* (Ky.), 33 S. W. Rep. 1113; *Screwmen's Benev. Asso. v. Smith*, 70 Tex. 168; *Boreland v. Washington County*, 20 Pa. St. 150; *Pine Co. v. Willard*, 39 Minn. 125; *Farmers' Nat. Bank v. Braden*, 145 Pa. St. 473.

⁴⁴ *Bolz v. Stuhl*, 4 Pa. Super. Ct. 52.

⁴⁵ *Grocers Bank v. Kingman*, 16 Gray, 473.

⁴⁶ *Morris Canal v. Van Vorst*, 21 N. J. L. 100; *Pittsburg, etc., R. R. Co. v. Shaeffer*, 59 Pa. St. 350; *Willmington, etc., R. R. Co. v. Ling*, 18 S. Car. 539.

fraud on the part of the bank or its directors, a fraudulent concealment of something material for the surety to know must be shown.⁴⁷ The object of such bond is to guarantee the bank for the faithful performance of the cashier's duty, and the obligation is not to be affected by the neglect of the bank, and such negligence will not discharge the surety.⁴⁸ And before a bond in such case can be avoided, fraud and bad faith which has misled the sureties to their damage, must be brought home to the obligee by clear and decisive evidence.⁴⁹ The acceptance of the resignation of the principal and election of his successor without notice to the sureties does not relieve them from liability for his defaults before resignation.⁵⁰

§ 294. COVENANT NOT TO SUE.—A covenant not to sue one of several sureties will not discharge the others. The release of one of joint and several obligors is a release of all, but a covenant not to sue one of several obligors can never have the effect of a release, except to the one to whom it is given.⁵¹ So, where one of several obligors or sureties is given an instrument by the obligee covenanting not to sue him for default of his principal, it operates as an absolute release and acquittance of his liability on his principal's bond, and is a covenant not to sue; but none of the other joint and several sureties is released.⁵²

§ 295. ACCORD AND SATISFACTION.—The principal may settle his obligation by accord and satisfaction, and the surety thereby released. Thus, when the principal gives his note for settlement of the obligation, which is accepted as an absolute payment by the obligee, the surety held by the obligation is released.⁵³ Because a note of the principal given and received in satisfaction by express agreement will be considered a dis-

⁴⁷ *Atlas Bank v. Brownell*, 9 R. I. 168.

⁴⁸ *Tapley v. Martin*, 116 Mass. 275.

⁴⁹ *Bostwick v. Van Voorhis*, 91 N. Y. 353.

⁵⁰ *Stemmerman v. Lillienthal*, 54 S. Car. 440.

⁵¹ *Crane v. Alling*, 15 N. J. L. 423; *Dean v. Newhall*, 2 Term R. 168; *Thompson v. Lock*, 3 M. G. & S. 540; *Clark v. Mallory*, 83 Ill. App. 488.

⁵² *Bowne v. Bank*, 45 N. J. L. 360.

⁵³ *Morris Canal v. Van Vorst*, 21 N. J. L. 100.

charge of the original contract.⁵⁴ And so an executed parol agreement may abrogate a bond or sealed instrument in many jurisdictions.⁵⁵

§ 296. NOTICE OF SURETY'S WITHDRAWAL.—A surety can withdraw from the bond of an officer of a corporation by giving reasonable notice. But the withdrawal cannot take effect immediately upon service of notice. Because the directors receiving such notice must have a reasonable time to act and to give notice to the principal and the co-sureties if there be any, and time to procure a new bond. Hence such notice cannot operate immediately, and such notice does not affect the liability of the other sureties.⁵⁶

§ 297. DISCHARGE BY ACTS OF THE OBLIGEE.—Acts of the corporation may be such as to discharge the sureties who are on the bond of one of its agents. Thus, the sureties on a treasurer's bond are not liable for defaults which occurred after the omission to re-elect him at a regular meeting of the directors of the corporation for that purpose, and after such further time as may be reasonably sufficient for the election and qualification of his successor, although he continues to act as treasurer, and his re-election at the next meeting thereafter.⁵⁷ So where a charter is forfeited the sureties on a cashier's bond are not liable afterwards, though a statute is passed reviving the charter.⁵⁸ So, where the remuneration of the principal is changed so as to make a different agency, the sureties are released.⁵⁹

§ 298. ACTION ON THE BOND.—The action on the bond is often regulated by statute. Thus, in Massachusetts, the sure-

⁵⁴ *Sheeby v. Mandeville*, 6 Cranch, 253.

⁵⁵ *Alschuler v. Schiff*, 164 Ill. 298; *Allen v. Jaquish*, 21 Wend. 623; *Talbot v. Whipple*, 14 Allen, 177.

⁵⁶ *Bostwick v. Van Voorhis*, 91 N. Y. 353.

⁵⁷ *Lexington, etc., R. R. Co. v. Elwell*, 8 Allen, 371.

⁵⁸ *Bank v. Barrington*, 2 P. & W. (Pa.) 27. Compare *Union Bank v. Forrest*, 3 Cranch, C. C. 218.

⁵⁹ *Northwestern Railway Co. v. Whinary*, 10 Exch. 17.

ties on a bond, severally, but not jointly, may be joined as defendants in one action on the bond.⁶⁰ The sole purpose of this statute is to facilitate proceedings against parties severally liable on the same contract, and to permit their rights to be determined under one process, instead of compelling the party seeking redress to resort to several actions.⁶¹ If the bond is made to the directors instead of the corporation, the legal effect is to make it apply to the corporation, which may bring action against the sureties.⁶² If the bond is given to the directors of a joint stock company, who are elected annually, such directors can bring action on the bond after they have ceased to be directors.⁶³

If a surety in witness of his obligation to perform certain covenants and conditions affixes his hand and seal to the instrument, and delivers it as his bond, it is adequate to bind him, although his name is not mentioned in any part of the body of the bond, and a blank for it is left unfilled.⁶⁴ And so two or more obligors may adopt one seal and be charged as obligors, although the names of all the signers do not appear in the body of the bond.⁶⁵

In a joint action against a cashier and his sureties the admissions and declarations of the cashier as to his defaults are evidence against his sureties.⁶⁶ Because the principal and sureties are all bound by a joint obligation, all declarations and admissions of the principal are evidence against the sureties in an action against them.⁶⁷ In a joint and several bond a principal is not a necessary party to an action against his surety.⁶⁸

§ 299. SURETIES CONCLUDED BY RECITALS IN A BOND.—

⁶⁰ *Grocers Bank v. Kingman*, 16 Gray, 473.

⁶¹ *Fuller v. Morris*, 4 Gray, 295.

⁶² *Bayle v. Ins. Co.*, 6 Hill (N. Y.), 476.

⁶³ *Anderson v. Langdon*, 1 Wheat. 85.

⁶⁴ *Howell v. Parsons*, 89 N. C. 230; *Danker v. Atwood*, 119 Mass. 146; *Scheid v. Liebshultz*, 51 Ind. 28.

⁶⁵ *Building Association v. Cummings*, 45 Ohio St. 664.

⁶⁶ *Amherst Bank v. Root*, 2 Met. 522.

⁶⁷ *Pendleton v. Bank*, 1 Mon. 181. See, also, *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 327.

⁶⁸ *Whipp v. Casey* (R. I.), 45 At. Rep. 93.

Sureties are concluded by the recitals in the bond which they have executed.⁶⁹ Thus, where a cashier's bond recites that he had been appointed by the board of directors, such recital is conclusive on the sureties.⁷⁰ And so when the recital states that a certain person has been appointed an officer or agent, the surety cannot contradict this by showing that the appointment was in fact subsequent to the date or even to the delivery of the bond.⁷¹ When the condition of the bond is plainly set forth it cannot be controlled by any recitals not plainly inconsistent therewith.⁷²

§ 300. LIABILITY FOR LOSS OF MONEY.—An agent or officer of a corporation is required to use reasonable diligence in taking care of money coming into his hands. If he does this he and his sureties are not liable for loss. Thus, an agent of a railroad company who has exercised due care and diligence, and kept the money as required by the corporation, and it is stolen, he and his sureties are not liable.⁷³ So where a party receives public moneys, but is not a public officer and disbursing officer of the money, and uses due diligence, and the money is lost or stolen, he is not liable therefor. Thus, a surrogate is not a public officer appointed to receive or disburse public money, and it is not his main duty to receive, keep or disburse the money of individuals. He is a mere trustee or agent of the private parties whose money comes into his hands by order of court. So if he deposits such money in a bank which fails, without neglect on his part, he and his sureties are not liable for the money lost by such failure.⁷⁴

⁶⁹ *Thompson v. Denner*, 16 App. Div. 160; *Cutler v. Dickinson*, 8 Pick.

⁷⁰ *Lionberger v. Kreiger*, 88 Mo. 160.

⁷¹ *Washington Co. v. Ins. Co.*, 26 Conn. 42.

⁷² *Australian Joint Stock Bank v. Bailey* (1899), App. Cas. 396.

⁷³ *Chicago, etc., R. R. Co. v. Bartlett*, 120 Ill. 603.

⁷⁴ *People v. Faulkner*, 107 N. Y. 477.

CHAPTER XII.

BONDS OF PUBLIC OFFICERS AND AGENTS.

§ 301. **EXTENT OF SURETY'S LIABILITY.**—The liability of a surety is not to be extended by implication beyond the terms of his contract. When he signs the bond of a public officer he undertakes to be responsible for the principal's official acts during the term of his office.¹ So the sureties are liable for all moneys received in an official capacity by their principal, or in his hands during the term of office, but not for his wrongful acts before they became responsible for his official conduct by signing his bond.² So when money has been received and converted by the officer during a prior term, the sureties on a subsequent bond are not liable for such past default.³ The sureties are only liable for the misconduct of the officer in his official capacity during his term, when they were his surety.⁴ And until the sureties are accepted by the obligee, they are at liberty to revoke the bond. But until they signify an intention to recede, the State may bind them by accepting their offer to answer for the official misconduct of their principal.⁵ And the principal in an official bond has the implied agency to deliver it as the contract of the sureties.⁶

When the surety signs a bond the law raises an implied promise by the principal to reimburse the surety for any loss which

¹Ladd v. Trustees, 80 Ill. 234; Rochester v. Randall, 105 Mass. 295.

²Morley v. Metamore, 76 Ill. 396; Parker v. Medaker, 80 Ind. 155; Stern v. People, 96 Ill. 475; State v. Alsup, 91 Mo. 172; Detroit v. Weber, 29 Mich. 24; Van Sickel v. Buffalo Co., 13 Neb. 103

³Bissell v. Saxton, 66 N. Y. 55.

⁴People v. Smith, 123 Cal. 70; State v. Moore, 56 Neb. 82; Pundman v. Schoenlich, 144 Mo. 149; Cheboygan Co. v. Erratt, 110 Mich. 156.

⁵State v. Dunn, 11 La. Ann. 550; Paxton v. State (Neb.), 81 N. W. Rep. 383.

⁶Pequawket Bridge v. Mathis, 8 N. H. 139; King Co. v. Perry, 5 Wash. 536.

he may sustain, and when the loss occurs this implied contract of indemnity relates back and takes effect from the time when the surety became responsible.⁷ An illegal agreement by a public officer to deposit public funds in a bank represented by his sureties, upon which agreement they sign the bond, is so blended with the officer's implied promise to indemnify the sureties against loss that the implied promise cannot be enforced by them. Because the law will not enforce an implied promise of indemnity resting upon an illegal consideration that a bank would borrow money and pay interest on it; the parties in such case are all engaged in the illegal enterprise, and all are equally involved.⁸

§ 302. LIABILITY OF SURETY FOR PREVIOUS DEFAULTS OF THE OFFICER.—In the absence of statute providing otherwise, or of express stipulation in the bond, sureties on officers' bonds are not liable for the defaults of their principal occurring before the execution of the bond. And the fact that the principal is the incumbent of the same office for successive terms, does not change the rule, since, in such cases, the sureties on the last bond must be treated and considered, and the extent of their liability determined as far as practicable, as if their principal had not been the incumbent for the preceding term.⁹

§ 303. PRESUMPTION AS TO SURETIES ON A SECOND BOND.—No presumption arises against the sureties on a second official bond, that moneys which came into the principal's official possession, while a former bond was in force, were in his hands when the second bond was executed; but each case must be governed by its own particular facts and circumstances.¹⁰ Some

⁷ *Choteau v. Jones*, 11 Ill. 300; *Ramsay v. Whitbeck*, 183 Ill. 550; *Rice v. Southgate*, 16 Gray, 142.

⁸ *Ramsay v. Whitbeck*, 183 Ill. 550.

⁹ *Townsend v. Everett*, 4 Ala. 607; *Farrar v. United States*, 5 Pet. 373; *United States v. Boyd*, 15 Pet. 187; *Bissell v. Saxton*, 66 N. Y. 60; *Detroit v. Weber*, 29 Mich. 24; *Vivian v. Otis*, 24 Wis. 518; *McPhillips v. McGrath*, 117 Ala. 549

¹⁰ *McPhillips v. McGrath*, 117 Ala. 549.

courts state the doctrine still stronger, that there is no presumption as against the sureties on a second bond, that the money which came into the possession of the principal while a former bond was in force, is still in his hands when the second was executed, thereby making the second sureties liable.¹¹ But it is the better rule that each case, as to such presumptions, must be governed by its particular facts and circumstances. But if there is no evidence whatever to determine in which term the default occurred, the law will presume that it occurred in the last term.¹³

§ 304. *DE FACTO OFFICERS*.—Where it appears that a party elected or appointed to a public office, has executed a bond, but has not qualified according to law, and takes possession of the office by color of right, he is a *de facto* officer, and the sureties on his bond are liable for his official defaults. A person being an officer *de facto* will not be permitted to show or rely upon the fact that he was not an officer *de jure* for the purpose of attacking and setting aside anything which he may have done in his official capacity; and upon like reasons his sureties are also estopped.¹⁴ So where the election of a sheriff was void, and his induction into office illegal, he becomes an officer *de facto*, but not *de jure*, and those on his voluntary bond as sureties cannot absolve themselves from liability by insisting that he was not sheriff.¹⁵ If a person discharges the duties of a public officer under color of right, he is an officer *de facto*, and not a mere intruder, and his sureties are estopped by the recitals in his official bond from denying that he was entitled to the office.¹⁶

¹¹ *Myers v. United States*, 1 McLean, 493.

¹² *Williams v. Harrison*, 19 Ala. 277; *McPhillips v. McGrath*, 117 Ala. 549.

¹³ *Kelly v. State*, 25 Ohio St. 567; *Clark v. Wilkinson*, 59 Wis. 543; *Kagey v. Trustees*, 68 Ill. 75; *Pine Co. v. Willard*, 39 Minn. 125; *Backenstedt v. Perkins*, 73 Iowa, 23; *Goodwin v. State*, 81 Ind. 109. Compare *Trustees v. Smith*, 88 Ill. 181; *Phipsbury v. Dickinson*, 78 Me. 457.

¹⁴ *Green v. Wardwell*, 17 Ill. 278; *Chicago v. Gage*, 95 Ill. 593; *Boone Co. v. Jones*, 54 Iowa, 699; *Plymouth v. Painter*, 17 Conn. 585; *Buckman v. Ruggles*, 15 Mass. 180; *People v. Collins*, 7 Johns. 549; *Reed v. Hedges*, 16 W. Va. 194; *Holt Co. v. Scott*, 53 Neb. 176.

¹⁵ *Jones v. Scanland*, 6 Humph. 195.

¹⁶ *State v. Rhoades*, 6 Nev. 352; *Holt Co. v. Scott*, 53 Neb. 176.

§ 305. OFFICERS HOLDING OVER.—A bond or obligation given to secure the performance of official duties, is to be construed with reference to the term for which the incumbent is elected or appointed; and the law governing as to term, its time of commencement and expiration, and the conditions and contingencies upon which it shall begin, continue and come to an end, enters into and forms a part of such bond or obligation where general language is used in stipulating the conditions. The sureties upon such undertaking are presumed to know the duration and term when they become parties to such bond, and to have intended to bind themselves to the extent and for and during the time that their principals were bound.¹⁷ And where it is provided by law that a public officer shall hold his office until his successor is appointed or elected, the term of office does not expire until he leaves the office, as he continues in office by virtue of the previous election and qualification. Hence, the sureties on his official bond of such officer who holds under the law until his successor is appointed or elected and qualified, are liable for defalcations of their principal after the expiration of the year, while holding over pending the election or appointment of his successor.¹⁸ For the official acts of the principal during the time he thus holds over without any new appointment, come within the term, and he and his sureties are liable on his official bond given at the time of the qualification.¹⁹

Some authorities hold that the officer so holding over after the technical term, is not an officer *de jure*, and that the time intervening between the expiration of the period fixed by the statute, and the election and qualification of a successor, is not a part of the preceding term, and that the holding over is *pro*

¹⁷ Mayor v. Crowell, 40 N. J. L. 207; Scott Co. v. Ring, 29 Minn. 401; Welch v. Seymour, 28 Conn. 393; Wapello Co. v. Bigham, 10 Iowa, 42; Savings Bank v. Hunt, 72 Mo. 597; State v. Berry, 50 Ind. 496; Sparks v. Bank, 3 Del. Ch. 300; Riddel v. School Dist., 15 Kan. 168.

¹⁸ Baker City v. Murphy, 30 Oreg. 405.

¹⁹ Long v. Seay, 72 Mo. 648; State v. Kurtzebone, 78 Mo. 99; State v. Sullivan, 45 Minn. 309; Eddy v. Kincaid, 28 Oreg. 537; State v. Wells, 8 Nev. 105; Thompson v. State, 37 Miss. 518; Baker City v. Murphy, 30 Oreg. 405.

tempore.²⁰ And in other cases it is held that the holding over is only an acceptancy of that proportion of the successor's term.²¹ Again it is stated that this liability of the sureties for the officer's defaults who holds over, is an exception to the rule that the liability of a surety ends with the expiration of the principal's term, and does not continue for the additional time.

But whether considered as an exception or as the rule itself, it can only be sustained upon the principle that the holding over is a continuance of the term, and together with the technical term constitutes one and the same term. But where the legislature extends the term after the execution of the bond, it is said the rule is different. Such extension will be an impairment of the sureties' contract; for, at the time of assuming the obligation, they could not have had in mind the extended period which the legislature afterwards saw fit to add to the term fixed by law, and did not engage to become responsible for the acts of their principal during the added time.²²

But other courts of the highest standing hold a different view, which cannot be reconciled with the doctrine that the sureties are responsible for the official acts of the principal during the time of holding over. They hold that when an officer holds for the definite term and until his successor is elected or appointed, the sureties are liable only for a reasonable period after the expiration of the technical term, for the election and qualification of the successor; that it is not reasonable to suppose that the sureties may be held for an indefinite time, even for their lifetime.²³

§ 306. DEATH OF OFFICER.—The death of a public officer during his term creates a vacancy, but does not change his obligations. And so where the money is not paid according to his

²⁰ *State v. Howe*, 25 Ohio St. 597.

²¹ *Riddell v. School Dist.*, 15 Kan. 170.

²² *King Co. v. Ferry*, 5 Wash. 536. Compare *People v. McHatton*, 2 Gil. (Ill.) 732.

²³ *Chelmsford Co. v. Demorest*, 7 Gray, 1; *Mayor v. Crowell*, 40 N. J. L. 207; *Citizen's Loan Assn. v. Nugent*, 40 N. J. L. 215; *Mayor v. Horn*, 2 Harr. (Del.) 190; *Dover v. Twombly*, 42 N. H. 59; *Welch v. Seymour*, 28 Conn. 387.

obligation to his successor, the sureties on his bond are liable.²⁴ Because the obligation was to pay over to the proper officer the money in his hand at the termination of his service, in whatever way that event may be produced, whether by resignation, removal or death.²⁵

The rule as to the obligation of a guarantor in respect to transactions occurring after his death, is that the obligation is not affected by his death, if the contract of guaranty is one from which he might not withdraw upon notice; if he could have done so, then his death will give the effect of a notice of withdrawal, as held by some courts;²⁶ but other decisions hold that before his death is notice, it must be brought home to the obligee.²⁷ And so where the surety cannot be released without the consent of the obligee, his death makes his estate liable for defaults of his principal.²⁸

§ 307. MONEY USED TO COVER PREVIOUS DELINQUENCIES.— Sureties on a second bond are responsible for public money received during the second term, which is applied to cover a previous delinquency under a former bond, because it is a misapplication of money.²⁹ Thus, where a collector receives taxes for a particular year, and instead of having them applied to the credit of the taxes for that year with which he is chargeable, directs their application to the discharge of his defaults for previous years, such application is a breach of his official bond, for which his last sureties are responsible.³⁰ Paying money received in a subsequent term to make satisfaction of defalcation

²⁴ *Great Falls v. Hanks*, 21 Mont. 83.

²⁵ *Allen v. State*, 6 Blackf. (Ind.) 252.

²⁶ *Lloyd v. Harper*, 16 Ch. Div. 290; *Calvert v. Gordon*, 3 Man. & R. 124; *Green v. Young*, 8 Me. 14; *Moore v. Wallis*, 18 Ala. 458; *Voris v. State*, 47 Ind. 345.

²⁷ *Jordan v. Dobbins*, 122 Mass. 168; *Hyland v. Habich*, 150 Mass. 112; *Coulthart v. Clementson*, 5 Q. B. Div. 42; *Gray v. Wood*, 67 Conn. 147.

²⁸ *Fewlass v. Keesham*, 88 Fed. Rep. 573; *Holden v. Jones*, 7 Ired. L. 191.

²⁹ *Pine Co. v. Willard*, 39 Minn. 125; *Gwynne v. Burnell*, 7 Cl. & F. 572; *Coleraine v. Bell*, 7 Met. 499; *State v. Sooy*, 39 N. J. L. 539.

³⁰ *Frownfelter v. State*, 66 Md. 80.

tions occurring in a prior term is a breach of his last bond, as a misappropriation of money received in his official capacity, and his last sureties are liable for such breach as if he had paid it out for any other purpose not in his official capacity.³¹

§ 308. GIVING SECOND BOND IN SAME TERM.—Giving an additional bond during the same term of office does not necessarily discharge the sureties on the first bond. The sureties on the first bond are not released, because the second bond does not operate as a merger or extinguishment of the first security, as it is of no higher degree,³² and is to be treated as a concurrent security with the original bond.³³ Thus, where a sheriff, on the order of the court, gives an additional bond, either or both sets of sureties are liable to a party injured by the official acts of the sheriff.³⁴ So where a city, according to law, exacts another bond, this does not release the sureties on the first bond.³⁵

In giving a second bond, the sureties are only liable for such acts as are thereafter done by the principal, unless the stipulations in the bond or the statute provide that the second sureties shall be liable for prior as well as subsequent delinquencies of the officer.³⁶

§ 309. GIVING BOND WITHOUT STATUTORY AUTHORITY.—In some instances an officer has been required to give a bond which is not required by statutory provisions; that is, he gives a voluntary bond. Such bonds are valid obligations, and sureties on the same are liable for defaults of their principal in like manner as if such bond was required by statute; such bonds are a

³¹ *Gynne v. Burnell*, 7 Cl. & F. 572.

³² *Postmaster Gen. v. Munger*, 2 Paine, 189; *Hand Mfg. Co. v. Marks* (Oreg.), 59 Pac. Rep. 549.

³³ *State v. Sappington*, 67 Mo. 529; *Allen v. State*, 61 Ind. 268.

³⁴ *State v. Crooks*, 7 Ohio, 573.

³⁵ *New Orleans v. Gauthreaux*, 39 La. Ann. 109.

³⁶ *Jones v. Gallatine Co.*, 78 Ky. 491; *Cullom v. Dolloff*, 94 Ill. 330. See, also, *Schuff v. Pflanz*, 99 Ky. 97; *McPhillips v. McGrath*, 117 Ala. 549.

good common-law obligation.³⁷ It is sufficient to make a bond valid as a common-law obligation, that it is voluntarily given, and that the office and the duties assigned to the officer and covered by the bond, are duly authorized by law.³⁸ Thus, a voluntary bond given by a State treasurer for the faithful discharge of his duties, is valid.³⁹ The general rule is that a bond, whether required by statute or not, is a good common-law bond, if entered into voluntarily and for a valuable consideration, and if not repugnant to the letter or policy of the law.⁴⁰

§ 310. GENERAL AND SPECIAL BONDS GIVEN BY AN OFFICER.—The general rule is that when an officer is required to perform a duty which is special in its nature, he is required to give a special bond, though he has already given a general bond, and in the absence of any declaration that the sureties on the general bond shall also be liable, it does not bind them for the special duty.⁴¹ Thus, a county treasurer, where his bond does not cover money coming into his hands for sale of school and university lands, is not liable on his bond for the misappropriation of such money, nor his sureties. To make him liable, a special bond, covering such money, should have been given.⁴² The sureties on the officer's general bond are not liable for any delinquency in the performance of such new obligation.⁴³

³⁷ *United States v. Tingey*, 5 Pet. 115; *United States v. Bradley*, 10 Pet. 360.

³⁸ *United States v. Rogers*, 28 Fed. Rep. 607.

³⁹ *Sooy v. State*, 38 N. J. L. 324.

⁴⁰ *People v. Collins*, 7 Johns. 554; *State v. Harvey*, 57 Miss. 863; *Potter v. State*, 23 Ind. 550; *Crawford v. Howard*, 9 Ga. 314.

⁴¹ *State v. Corey*, 16 Ohio St. 17; *People v. Moon*, 3 Scam. (Ill.) 123; *State v. Johnson*, 55 Mo. 80; *United States v. Cheeseman*, 3 Saw. 424; *State v. Younge*, 23 Minn. 551; *Henderson v. Coover*, 4 Nev. 429; *Lyman v. Conkey*, 1 Met. 317; *Williams v. Morton*, 38 Me. 52; *Commonwealth v. Toms*, 45 Pa. St. 408; *Milwaukee Co. v. Ehlers*, 45 Wis. 281; *Milwaukee Co. v. Pabst*, 70 Wis. 352; *White v. East Saginaw*, 43 Mich. 567; *Briton v. Fort Worth*, 78 Tex. 227; *State v. Bateman*, 102 N. Car. 52.

⁴² *Redwood Co. v. Tower*, 28 Minn. 45; *Morrow v. Wood*, 56 Ala. 3.

⁴³ *Columbia Co. v. Massie*, 31 Oreg. 292; *Anderson v. Thompson*, 10 Bush, 132; *County Board v. Bateman*, 102 N. Car. 52; *Cartly v. Allen*, 56 Ala. 198.

§ 311. SURETIES ARE LIABLE ONLY FOR THEIR PRINCIPAL'S OFFICIAL ACTS.—For all defaults of the officer within the limit of what the law authorizes or enjoins upon him, as such officer, the sureties are bound; but they are not bound for acts which are not official, that is, done in his official capacity.⁴⁴

In the assumption of duties not belonging to his office, or the neglect of other officers in the discharge of other duties, he cannot extend the sureties' liability beyond the terms of his undertaking for which the sureties engaged to see completed.⁴⁵ The sureties' liabilities cannot be enlarged by the acts of their principal.⁴⁶

§ 312. SUBSEQUENTLY IMPOSED DUTIES.—Duties not yet existing and not germane to the office are not within the contemplation of the sureties on the official bond, nor properly covered by their obligation; hence, sureties are not liable for subsequently imposed duties.⁴⁷ Thus, where the principal gives a bond for the faithful performance of his duties as collector for a certain number of townships, and the bond is afterwards altered so as to embrace another township without the consent of the sureties, they are discharged for money subsequently collected and embezzled by the officer.⁴⁸

§ 313. SUBSEQUENTLY IMPOSED DUTIES BY THE LEGISLATURE.—Sureties signing the bond of a public officer, have within contemplation all changes that may be made by law as to the

⁴⁴ *People v. Hilton*, 36 Fed. Rep. 172; *Orton v. Lincoln*, 156 Ill. 499; *State v. Moore*, 56 Neb. 82; *People v. Pennock*, 60 N. Y. 421; *Scott v. State*, 46 Ind. 203; *State v. Bower*, 72 Mo. 387; *Heidenheimer v. Brent*, 59 Tex. 533; *People v. Lucas*, 93 N. Y. 585; *Webb v. Auspach*, 3 Ohio St. 522; *Ward v. State*, 81 N. Y. 406; *Leitch v. Taylor*, 7 Barn. & Cr. 491.

⁴⁵ *People v. Pennock*, 60 N. Y. 421; *Supervisors v. Bates*, 17 N. Y. 242.

⁴⁶ *People v. Toomy*, 122 Ill. 308; *Howard Co. v. Hill*, 88 Md. 111.

⁴⁷ *Gausson v. United States*, 97 U. S. 584; *Converse v. United States*, 21 How. 463; *Commonwealth v. Holmes*, 25 Gratt. 771; *White v. East Saginaw*, 43 Mich. 587; *Lafayette v. James*, 32 Ind. 240; *Mailing Union v. Graham*, L. R. 5 C. P. 201.

⁴⁸ *Miller v. Stewart*, 9 Wheat. 680.

officer's duties, and are liable for his defaults after such additional obligations.⁴⁹ There is a difference between the contract of public officers and the State, and the contract between individuals. In the contracts of individuals no alteration can be made without mutual consent of both parties. In the case of a public officer and the State, the legislature has power at any and all times to change the duties of officers, and the continued existence of that power is known to the officer and his sureties, and the officer accepts the office and the sureties execute the bond with this knowledge; the power of the legislature to change his duties enters into and becomes a part of his contract.⁵⁰ Thus, it is said the legislative extension of the time, for paying over taxes, of three weeks does not discharge the sureties on the tax collector's bond.⁵¹ So the sureties on a sheriff's bond are liable for defaults of their principal, for the performance of new duties created after the bond was executed.⁵² The only limitation to this rule is that the new duties imposed shall be of the same general nature and character as the existing duties.⁵³

§ 314. THE STATE IS NOT RESPONSIBLE FOR ITS OFFICERS' ACTS.—Neither the neglect or failure of the government to discharge some duty to a third party, nor its neglect or laches in enforcing a compliance with the bond's conditions, will release the sureties from their obligation.⁵⁴ Any neglect of a public officer gives his sureties no rights against the State and affords them no excuse for not performing their obligation according

⁴⁹ *Dawson v. State*, 38 Ohio St. 1; *Prickett v. People*, 88 Ill. 115.

⁵⁰ *People v. Vilas*, 36 N. Y. 459; *Colter v. Morgan*, 12 B. Mon. 278; *Mooney v. State*, 13 Mo. 7; *People v. Backus*, 117 N. Y. 196; *Cambridge v. Fifield*, 126 Mass. 428; *Mahaska Co. v. Ingalls*, 14 Iowa, 170; *Scott Co. v. Ring*, 29 Minn. 398. Compare *Pybus v. Gibbs*, 6 El. & Bl. 903; *United States v. Kirkpatrick*, 9 Wheat. 720; *Bartlett v. Atty.-Gen.*, Park, 277.

⁵¹ *People v. McHatton*, 2 Gil. (Ill.) 732. See, also, *Kindle v. State*, 7 Blackf. (Ind.) 506; *State v. Carleton*, 1 Gill (Md.), 249. Compare *King Co. v. Ferry*, 5 Wash. 536.

⁵² *Mooney v. State*, 13 Mo. 7.

⁵³ *People v. Vilas*, 36 N. Y. 459; *White v. Fox*, 22 Me. 341.

⁵⁴ *United States v. Witten*, 143 U. S. 76; *Hart v. United States*, 95 U. S. 316; *Mintern v. United States*, 106 U. S. 437.

to its terms.⁵⁵ The State is not responsible for acts of its officers, and the officer's sureties enter upon their contract with full knowledge of this principle of law.⁵⁶ Thus, the failure of the governing body to compel a county treasurer to make prompt settlement, and he defaults, does not discharge his sureties;⁵⁷ for such governing body is not responsible for the wrongful acts of its officer.⁵⁸ So the sureties on the officer's bond cannot successfully plead the neglect or failure of the State to require their principal to render an account or remove him for neglect as required of such officer by law, as a defense to their liability upon a subsequent breach of the bond.⁵⁹ Thus, the default of a county treasurer is not excused by the neglect of the county board, and it cannot be interposed as a defense by his sureties.⁶⁰

§ 315. FORGERY OF PRIOR SURETY'S NAME.—The fact that the name of one of the sureties to an officer's bond has been forged, unknown to the obligee when the bond was accepted, will not discharge the surety who subsequently executes the bond in ignorance of such forgery.⁶¹ And the fact that the surety whose name was forged gives him no information of the fact, where the condition upon which the surety signs is unknown to the

⁵⁵ *Hart v. United States*, 95 U. S. 316; *Mintern v. United States*, 106 U. S. 437.

⁵⁶ *Britton v. Fort Worth*, 78 Tex. 227; *Boardman Tower v. Flagg*, 70 Minn. 338; *Boone Co. v. Jones*, 54 Iowa, 699; *Waseca Co. v. Sheehan*, 42 Minn. 57; *Stern v. People*, 102 Ill. 540; *Kewaunee v. Kniper*, 37 Wis. 496; *Hart v. United States*, 95 U. S. 316.

⁵⁷ *Crawn v. Commonwealth*, 84 Va. 282.

⁵⁸ *Gibson v. United States*, 8 Wall. 269; *Jones v. United States*, 18 Wall. 662; *Manly v. Atchison*, 9 Kan. 358; *Commonwealth v. Wolbert*, 6 Binn. (Pa.) 292; *People v. Russell*, 4 Wend. 570; *Looney v. Hughes*, 26 N. Y. 514.

⁵⁹ *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Vanzandt*, 11 Wheat. 184; *United States v. Boyd*, 15 Pet. 187.

⁶⁰ *Coons v. People*, 76 Ill. 391; *Cawley v. People*, 95 Ill. 249.

⁶¹ *Stern v. People*, 102 Ill. 340. In *Seely v. People*, 27 Ill. 173, it was held where a party executes a bond as surety with another whose name has been forged, he will not be liable; but in *Stoner v. Millikin*, 85 Ill. 218, that case is overruled. And the case of *People v. Oregon*, 27 Ill. 29, in so far as it makes distinction in this regard between commercial paper and other instruments, it is overruled in *Chicago v. Gage*, 95 Ill. 593.

obligee or officer to whom the bond is given at the time he accepts it does not discharge him.⁶²

And if the forged name is erased or obliterated before the delivery of the bond, the rights of the obligors therein will not be altered or their liability affected thereby, and, of course, the surety is liable.⁶³ Because the surety would have been liable had the erasure not been made. The obliterating the forged name in no respect altered the rights or affected his liability. Where one of two innocent parties must be the loser by the deceit or fraud of another, the loss must fall on him who employs and puts trust and confidence in the deceiver, and not on the other.⁶⁴

§ 316. MONEY LOST OR STOLEN FROM PRINCIPAL.—The general rule is that money lost or stolen from the principal is no exception to the rule that binds the surety; so for such money the sureties are liable.⁶⁵ Thus, the loss of public moneys by a receiver and disbursing officer of it, feloniously taken from him without fault on his part, does not discharge him or his sureties from the obligation on his bond;⁶⁶ the same rule applies, though the receiver has been robbed,⁶⁷ or murdered.⁶⁸

The loss of money by theft or otherwise, by a public officer, is no excuse for non-performance of his obligation, and his sureties are liable for such in paying over the money.⁶⁹

⁶² *State v. Baker*, 64 Mo. 107; *State v. Pepper*, 31 Ind. 76. See, also, *Dair v. United States*, 16 Wall. 1; *Selser v. Brooks*, 3 Ohio St. 302.

⁶³ *York Co. Ins. Co. v. Brooks*, 51 Me. 506; *Stoner v. Milliken*, 85 Ill. 218.

⁶⁴ *Stoner v. Milliken*, 85 Ill. 218; *Hern v. Nichols*, 1 Salk. 289.

⁶⁵ *United States v. Prescott*, 3 How. 578; *United States v. Morgan*, 11 How. 160.

⁶⁶ *United States v. Dashiell*, 4 Wall. 182.

⁶⁷ *Boyden v. United States*, 13 Wall. 17.

⁶⁸ *United States v. Watts*, 1 N. Mex. 553.

⁶⁹ *Hancock v. Hazzard*, 12 Cush. 112; *German Am. Bank v. Auth.*, 87 Pa. St. 419; *Union Town v. Smith*, 39 Iowa, 9; *State v. Harper*, 6 Ohio St. 607; *State v. Moore*, 74 Mo. 413; *Rock v. Stringer*, 36 Ind. 346; *Board v. Jewell*, 44 Minn. 427; *State v. Lanier*, 31 La. Ann. 423; *Boggs v. State*, 40 Tex. 10; *Providence v. McCachron*, 35 N. J. L. 328, affirming 33 N. J. L. 339; *Taylor Town v. Morter*, 87 Iowa, 550; *Thompson v. Broad*, 30 Ill. 99;

The condition of the bond is to keep safely the public money, and such contract is absolutely without any condition, expressed or implied, and nothing but the payment of all the money when required can discharge the bond. The responsibility of the officer is not determined by the law of bailment, but by the condition of his bond, which provides that the officer will account for and pay over the moneys to be received. Hence, if the money is lost or stolen, the principal and his sureties are liable.⁷⁰

This general rule is denied in several cases. Thus, in Maine it is held that if, without fault or negligence on the part of the officer, he is violently robbed of money belonging to the State or county, he nor his sureties are liable for the money taken.⁷¹ And so in Alabama, if a tax collector, without negligence on his part, is robbed of the public moneys by irresistible force, which he could not have foreseen or guarded against, he is not liable for such moneys feloniously taken from him.⁷²

§ 317. DEPOSITING PUBLIC MONEY IN BANK.—When a public officer deposits the money received in a bank, he becomes a creditor and the bank a debtor, the same as if it was his own money. His office gives him no right to thus deposit the money. So where a public officer deposits money in a bank without authority of law, and the bank thereafter fails and the money is lost, the officer and his sureties are liable for the same.⁷³ And the fact that the county does not provide a safe or suitable place where the money of the officer may be kept, will not release him

Wood v. School Dist., 10 Neb. 293; State v. Nevin, 19 Nev. 162. See, also, Monticello v. Lowell, 70 Me. 437.

⁷⁰ Ingles v. State, 61 Ind. 212; Muzzy v. Shattuck, 1 Denio, 233; Commonwealth v. Conly, 3 Pa. St. 372; United States v. Thomas, 15 Wall. 337; State v. Harper, 6 Ohio St. 607.

⁷¹ Cumberland v. Pennell, 69 Me. 35..

⁷² State v. Houston, 78 Ala. 576; 83 Ala. 361. See, also, Houghton v. Freeland, 26 Grant, Ch. 500; Albany Co. v. Dorr, 25 Wend. 446; United States v. Adams, 24 Fed. Rep. 348; Ross v. Hatch, 5 Iowa, 149.

⁷³ Supervisors v. Kaine, 39 Wis. 468; State v. Powell, 67 Mo. 395; State v. Moore, 74 Mo. 413.

from liability if he deposits it in bank when, by reason of the failure of the bank, it is lost.⁷⁴

In such case the bank is the agent of the officer, and not of the State or county, and failure of the bank and loss of money make the officer and his sureties liable.⁷⁵

In one or two States this rule has been changed. Thus, in South Carolina such public officer is not liable for the loss of public funds occasioned by the failure of a bank which was in good standing at the time the money was placed on deposit by him,⁷⁶ thus adopting the rule applicable to the agent of a corporation.⁷⁷ And in Wyoming, the sureties are not liable for moneys of a public treasurer deposited in a bank which failed, where the treasurer is without fault.⁷⁸

§ 318. MAKING PROFITS ON PUBLIC FUNDS.—An officer has no right to make profits on public funds. So where he receives interest for the loan or use of such funds, such interest will not belong to him.⁷⁹ So where an officer deposits the funds in a bank and draws interest on them, he and his sureties are liable for the interest so received by him from the bank.⁸⁰ And so where a city treasurer loans money to the city under direction of the council, the sureties on his bond are liable for the interest collected for which he fails to account.⁸¹

An agreement by a public officer to deposit money in a bank represented by his sureties, upon which interest is to be allowed him personally, is against public policy and illegal, especially when in violation of a statute.⁸²

⁷⁴ *Lowry v. Polk Co.*, 51 Iowa, 50.

⁷⁵ *Ward v. School Dist.*, 10 Neb. 293; *Myers v. Kiowa Co.*, 60 Kan. 189; *Hart v. Poor Guardians*, 81½ Pa. St. 466; *Haven v. Lathene*, 75 N. Car. 505; *Wilson v. Wichita Co.*, 67 Tex. 647.

⁷⁶ *York Co. v. Watson*, 15 S. Car. 1.

⁷⁷ *Chicago, etc., R. R. Co. v. Bartlett*, 120 Ill. 603.

⁷⁸ *Roberts v. Laramie County (Wyo.)*, 56 Pac. Rep. 915.

⁷⁹ *Richmond Co. v. Wandel*, 6 Lans. (N. Y.) 33; *Chicago v. Gage*, 95 Ill. 593; *Cassady v. Trustees*, 105 Ill. 561; *Lewis v. Dwight*, 10 Conn. 95.

⁸⁰ *Wheeling v. Black*, 25 W. Va. 266; *Perry v. Horn*, 22 W. Va. 381.

⁸¹ *Hunt v. State*, 124 Ind. 306. Compare *Renfroe v. Colquitt*, 74 Ga. 618; *State v. Blakemore*, 7 Heisk. 638; *United States v. Broadhead*, 127 U. S. 112.

⁸² *Ramsay v. Whitbeck*, 183 Ill. 550.

An illegal agreement by a public officer to receive interest on public funds deposited in a bank represented by his sureties, may be tacit as well as express, and its existence may be established by proof of facts and circumstances showing coincidences which can be accounted for upon no other assumption than that such an original understanding existed.⁸³

§ 319. INTEREST RECOVERED AFTER BREACH.—Until there is a breach of the condition of the bond which renders the principal and his sureties liable, there can be no right to interest on the account of such breach. And the earliest moment at which any one becomes liable on account of the breach, is the time of demand for the amount due or the beginning of a suit to recover the amount which is a sufficient demand;⁸⁴ or at the time when, by implication of law or by express terms in the bond, it is the duty of the officer to pay over the money to the owner without previous demand on his part.⁸⁵

§ 320. LIABILITY OF SURETIES AS TO PAYMENT OF PENALTIES.—Penalties are never extended by implication, nor are sureties held beyond what is clearly within the scope and purpose of their undertaking. And where a statute provides for a penalty to be incurred for breach of the bond, and does not by express terms nor by implication make the sureties liable for it, they are not responsible for such penalty.⁸⁶

An officer and his sureties are not liable upon his bond for performance of duties not therein set forth, but he is liable personally for the non-performance of his duty prescribed by statute to the party injured to the extent of the damage re-

⁸³ *Ramsay v. Whitbeck*, 183 Ill. 550.

⁸⁴ *United States v. Curtis*, 100 U. S. 119; *United States v. Poulson*, 30 Fed. Rep. 231.

⁸⁵ *Dodge v. Perkins*, 9 Pick. 368; *United States v. Arnold*, 1 Gall. 348; *Bank v. Smith*, 12 Allen, 293; *Leighton v. Brown*, 98 Mass. 515; *Frink v. Express Co.*, 82 Ga. 33; *Benchfield v. Haffey*, 34 Kan. 42.

⁸⁶ *Caspen v. People*, 6 Ill. App. 28; *Brooks v. Governor*, 17 Ala. 806; *State v. Baker*, 47 Miss. 88; *Moretz v. Ray*, 75 N. Car. 170. Compare *Wilson v. State*, 1 Lea, 316; *Wood v. Farvell*, 50 Ala. 546.

ceived.⁸⁷ Thus, the sureties on a county clerk's bond are not liable for his acts in issuing a license to marry to a minor in violation of law.⁸⁸ The statute may provide for the collection of the penalty from the principal and his sureties, in which case the sureties are liable for the breach, including the penalty.⁸⁹

§ 321. **ESTOPPEL BY JUDGMENT.**—A judgment is conclusive of what it necessarily decides only. When introduced in evidence as an estoppel it cannot be explained or varied by parol evidence.⁹⁰ So a judgment fairly obtained against one for whom another has given an indemnity, is evidence, and conclusive in a suit on the indemnity.⁹¹ But in a suit on an indemnity bond it must be shown that the defendant gave the indemnity, that the judgment was fairly obtained, and that it was rendered for a matter to which the indemnity applied. If this is not shown, the judgment is not conclusive.⁹² The general doctrine that the judgment against the principal is conclusive against the surety is founded on special statutes or a peculiar form of the bond.⁹³ Thus, where the sureties by express terms of their agreement or by reasonable implication from the very nature and intent of their obligation have stipulated to pay damages and costs which may be recovered against their principal, or otherwise to abide the decree or judgment of a court against the principal, then they are bound by the judgment, though they have no notice of the suit.⁹⁴

⁸⁷ *Holt v. McLean*, 75 N. Car. 347.

⁸⁸ *Brooks v. Governor*, 17 Ala. 806.

⁸⁹ *Tappan v. People*, 67 Ill. 339.

⁹⁰ *Eaton v. Harth*, 45 Ill. App. 355; *Ingersoll v. Seatoft*, 102 Wis. 476; *Kilson v. Farwell*, 132 Ill. 337.

⁹¹ *Clark v. Carrington*, 7 Cranch, 308; *Drummond v. Preston*, 12 Wheat. 515; *Levick v. Norton*, 51 Conn. 461.

⁹² *New Haven v. Chidsey*, 68 Conn. 397.

⁹³ *Commonwealth v. Barrows*, 46 Me. 497; *Dane v. Gilmer*, 51 Me. 547; *Dennie v. Smith*, 129 Mass. 143; *Tracy v. Goodwin*, 5 Allen, 409; *Chamberlain v. Godfrey*, 36 Vt. 380; *Tate v. James*, 50 Vt. 124.

⁹⁴ *Chamberlain v. Godfrey*, 36 Vt. 380.

Although there is a conflict of authority on this subject, estoppel of sureties by judgment against their principal, it seems to be the better opinion that, except in cases where, upon a fair construction of the contract, the surety may have undertaken to be responsible for the result of a suit, or where he is made privy to the suit by notice, and an opportunity is given to him to defend it, a judgment against the principal alone is, as a general rule, evidence of the fact of its recovery only, and not evidence of any facts for which it was necessary to find, in order to recover such judgment.⁹⁵

Of course one may agree to stand in the place of another, and to be so fully answerable for his debt or unlawful act as that a judgment against the latter shall conclude the former as to the amount of such debt or damage.⁹⁶

§ 322. SHERIFFS AND CONSTABLES.—The liability of sheriffs and constables for their defaults is fixed by the terms of the bond and the statute in force at the time of the execution and delivery of the bond.⁹⁷ But the sureties are not liable for acts of the officer before the time when the bond took effect.⁹⁸

§ 323. SCOPE OF LIABILITY.—Constables and sheriffs are liable for defaults committed under color or by virtue of their office.⁹⁹ But their sureties are not liable for acts of the officer which are not a part of his official duties.¹⁰⁰

A sheriff does not act officially in sending photographs of an accused person, with description of such person, to various indi-

⁹⁵ *DeGreiff v. Wilson*, 30 N. J. Eq. 435; *Pico v. Webster*, 14 Cal. 202; *Taylor v. Johnson*, 17 Ga. 521; *State v. Martin*, 20 Ark. 629; *Gillinan v. Strong*, 64 Pa. St. 242; *Whitehead v. Woolfolk*, 3 La. Ann. 43; *Lucas v. Governor*, 6 Ala. 826; *Shelby v. Governor*, 2 Blackf. (Ind.) 289; *Graves v. Bulkeley*, 25 Kan. 249; *Fay v. Edministon*, 25 Kan. 439.

⁹⁶ *Levick v. Norton*, 51 Conn. 461.

⁹⁷ *Freudenstein v. McNier*, 81 Ill. 208.

⁹⁸ *Bryan v. Kelly*, 85 Ala. 569.

⁹⁹ *Lowell v. Parker*, 10 Met. 309; *Jewell v. Mills*, 3 Bush, 62. Compare *Clancy v. Kenworthy*, 74 Iowa, 740.

¹⁰⁰ *People v. Foster*, 133 Ill. 496.

viduals and police departments, whereby the accused is held out to the world as a criminal; hence the sheriff and his sureties are not liable on his official bond for such acts, though the officer may be subject to a libel suit. If a sheriff deems it necessary to prevent the escape of an accused person, he may take the prisoner's photograph, and ascertain his height, weight and other physical peculiarities, and his name, residence, place of birth, and the like, without incurring liability on his official bond therefor, his acts being without personal violence to the prisoner.¹⁰¹

It is the duty of the officer to search the prisoner, and take from him all money or other articles that may be used, as evidence against him at the trial.¹⁰² The officer may also take from the prisoner any dangerous weapons, or anything else that the official may, in his discretion, deem necessary to his own or the public safety, or for the safe-keeping of the prisoner, and to prevent his escape; and such property, whether goods or money, is held subject to the order of the court.¹⁰³ And the officer may not only take any deadly weapon he may find on the prisoner, but also money or other articles of value found upon him, though not connected with the crime for which he was arrested, and which cannot be used as evidence on the trial, by means of which if left in his possession, he may procure his escape or obtain tools, implements or weapons with which to effect his escape.¹⁰⁴ Sureties are liable for the official acts of their principal, but not for his acts which are not a part of his official duties. Thus, where a sheriff goes into another State and falsely represents that he has extradition papers and arrests a person, his sureties are not liable for such act, but they are liable for his acts after coming back to his own State.¹⁰⁵

¹⁰¹ *Firestone v. Rice*, 71 Mich. 377; 15 Am. St. Rep. 266; *Diers v. Mallon*, 46 Neb. 121; 50 Am. St. Rep. 598.

¹⁰² *Rusher v. State*, 94 Ga. 363; 47 Am. St. Rep. 175.

¹⁰³ *Closson v. Morrison*, 47 N. H. 482; 93 Am. Dec. 459; *Commercial Exchange Bank v. McLeod*, 65 Iowa, 665; *Reifsnider v. Lee*, 44 Iowa, 101; *Holker v. Hennessy*, 141 Mo. 527; 64 Am. St. Rep. 524.

¹⁰⁴ *Closson v. Morrison*, 47 N. H. 482; *Holker v. Hennessy*, 141 Mo. 527.

¹⁰⁵ *Kendall v. Aleshire*, 28 Neb. 709.

§ 324. **LEVYING ON A STRANGER'S PROPERTY AND ON PROPERTY EXEMPT.**—The sureties of sheriffs and constables undertake that their principal shall faithfully perform all duties imposed upon their principal by law as such officers. It is as much their duty to refrain from committing wrongful, oppressive and injurious acts under color of their office as it is to perform their affirmative official acts in a proper manner. While there are a few decisions which hold the opposite view, yet the great weight of authority is that a levy by such officers upon property of a third person, is a breach of their bond for which the sureties are liable;¹⁰⁶ and it makes no difference whether the officer makes the levy or attachment knowingly or by mistake.¹⁰⁷ And the same rule applies when the officer levies upon and sells exempt property, and his sureties are liable.¹⁰⁸

In some jurisdictions it is held that the wrongful levy and sale of property of a stranger under an execution against another person is a mere trespass, for which the sureties of the officer are not liable.¹⁰⁹

The general rule applies to United States marshals who levy

¹⁰⁶ *Wiehler v. People*, 68 Ill. App. 282; *Norwalk v. Ireland*, 68 Conn. 1; *Archer v. Noble*, 3 Me. 418; *Brunott v. McKee*, 6 Watts & S. 513; *Van Pelt v. Little*, 14 Cal. 194; *Inhabitants v. Wilson*, 13 Gray, 385; *State v. Jennings*, 4 Ohio St. 418; *Horan v. People*, 10 Ill. App. 21; *State v. Fitzpatrick*, 64 Mo. 185; *Sangster v. Commonwealth*, 17 Gratt. 124; *Turner v. Killian*, 12 Neb. 580; *Hubbard v. Elden*, 43 Ohio St. 380; *People v. Merscreau*, 74 Mich. 687; *Carmack v. Commonwealth*, 5 Binn. 184; *Tracy v. Goodwin*, 5 Allen, 409; *Commonwealth v. Stockton*, 5 T. B. Mon. 192; *Jewell v. Mills*, 3 Bush, 62; *State v. Moore*, 19 Mo. 366; *Charles v. Hoskins*, 11 Iowa, 329; *Holliman v. Carroll*, 27 Tex. 23; *Marfins v. Willard*, 12 Wash. 528; *Hersey v. Marty*, 61 Minn. 430; *United States v. Hine*, 3 MacAr. 27.

¹⁰⁷ *Turner v. Killian*, 12 Neb. 580; *Holliman v. Carroll*, 27 Tex. 23; *Van Pelt v. Little*, 14 Cal. 194; *United States v. Hine*, 3 MacAr. 27; *State v. Jennings*, 4 Ohio St. 419; *Sangster v. Commonwealth*, 17 Gratt. 124; *Jewell v. Mills*, 3 Bush, 62; *Commonwealth v. Stockton*, 5 T. B. Mon. 192.

¹⁰⁸ *Hersey v. Marty*, 61 Minn. 430; *Casper v. People*, 6 Ill. App. 28; *Cole v. Cranford*, 69 Tex. 124; *State v. Carroll*, 9 Mo. App. 275.

¹⁰⁹ *People v. Lucas*, 93 N. Y. 585; *Carey v. State*, 34 Md. 105; *State v. Brown*, 11 Ired. (N. Car.) 141; *State v. Mann*, 21 Wis. 684; *Taylor v. Parker*, 43 Wis. 78; *Stockwell v. Robinson*, 9 Houst. 313; *State v. Conover*, 28 N. J. L. 224. Compare *Dishneau v. Newton*, 91 Wis. 199.

on a stranger's property,¹¹⁰ and the same rule will apply to coroners acting as sheriffs.¹¹¹

§ 325. OFFICERS LIABLE FOR MINISTERIAL DUTIES.—The officer and his sureties are liable for defaults arising out of the performance of his ministerial duties, which include those acts which the laws authorize him to perform, and which are considered to come within the scope of his office.¹¹² The officer is not civilly liable for judicial acts.¹¹³ But he and his sureties are liable for his acts for falsely certifying as true, bills rendered against the county, as such action is a misfeasance;¹¹⁴ and in general for overpayment exacted by him on process,¹¹⁵ except when he is honestly mistaken in making such charge;¹¹⁶ for omitting imperative statutory requirements;¹¹⁷ for a failure to levy;¹¹⁸ for an escape of prisoner;¹¹⁹ for failure to return process;¹²⁰ to deliver goods to the defendant on discontinuance of the action;¹²¹ for non-payment of money collected in his official capacity;¹²² for loss of attachment by his neglect or voluntary act;¹²³ for damages to property seized, caused by his neglect;¹²⁴ for failure to sell property levied upon;¹²⁵ for accepting insufficient sureties on a replevin bond;¹²⁶ for non-payment of rent, with money received for sale of tenant's goods.¹²⁷

¹¹⁰ *Lammon v. Feusier*, 111 U. S. 17.

¹¹¹ *Tiernan v. Haw*, 49 Iowa, 312.

¹¹² *State v. Powell*, 44 Mo. 436; *McGraw v. Governor*, 19 Ala. 89.

¹¹³ *Scott v. Ryan*, 115 Ala. 587.

¹¹⁴ *People v. Foster*, 133 Ill. 496.

¹¹⁵ *Kane v. Railroad Co.*, 5 Neb. 105; *Snell v. State*, 43 Ind. 359.

¹¹⁶ *State v. Ireland*, 68 N. Car. 300.

¹¹⁷ *Stifer v. State*, 114 Ind. 291.

¹¹⁸ *Commonwealth v. Fry*, 4 W. Va. 721; *Habershaw v. Sears*, 11 Oreg. 431.

¹¹⁹ *People v. Dikeman*, 3 Abb. App. Dec. 520.

¹²⁰ *McNee v. Sewell*, 14 Neb. 532; *Babka v. People*, 73 Ill. App. 246.

¹²¹ *Dennie v. Smith*, 129 Mass. 143; *Levy v. McDonald*, 45 Tex. 220.

¹²² *De La Garz v. Corolan*, 21 Tex. 387; *State v. Peterson*, 142 Mo. 526.

¹²³ *Commonwealth v. Coutner*, 18 Pa. St. 439; *Lyon v. Horner*, 32 W. Va. 432; *Bank v. Potius*, 10 Watts, 148.

¹²⁴ *Witkowski v. Hern*, 82 Cal. 604; *Tiernan v. Haw*, 49 Iowa, 312.

¹²⁵ *Wagmire v. State*, 80 Ind. 67.

¹²⁶ *Carter v. Duggan*, 144 Mass. 32.

¹²⁷ *Governor v. Edwards*, 4 Bibb, 219.

On the other hand, he and his sureties are not liable for money which he had no legal authority, by virtue of his office, to receive;¹²⁸ because it was not within the scope of his official duties;¹²⁹ nor are the sureties liable for penalties attached to his bond;¹³⁰ nor are they liable for acts not within the scope of the officer's duty,¹³¹ that is, duties not imposed upon him by law.¹³²

§ 326. DUTY TO INDIVIDUALS AND TO THE STATE.—At common law where the acts are ministerial and the officer is bound to render services for compensation for fees or salary, he is liable for misfeasance or non-feasance to the party who is injured by them, but is not civilly liable for judicial acts.¹³³ It is not under his ministerial functions to preserve the peace. For neglect in the performance of that duty he is punishable by indictment, and no civil action at common law therefor lies against him by persons who have suffered injury from violence of mobs or insurrection;¹³⁴ and his sureties are not liable for a wrong committed by him in aiding and abetting a mob in lynching a prisoner committed to his charge.¹³⁵ But, where he, within the scope of his duties, commits malfeasance, his sureties are liable. Thus, where an officer delivers a prisoner, handcuffed, to a deputy whom he knows to be incompetent, and that a mob is likely to seize and execute the prisoner, the officer and his sureties are liable for such neglect.¹³⁶ And where a deputy sheriff makes an arrest in the line of his duty, though illegal because in

¹²⁸ *Governor v. Wise*, 1 Cranch, 142; *Heidenheimer v. Brent*, 59 Tex. 533; *Turner v. Collier*, 4 Heisk. 89.

¹²⁹ *Walsh v. People*, 6 Ill. App. 204.

¹³⁰ *State v. Nichols*, 39 Miss. 318; *State Bank v. Brennan*, 7 Colo. App. 427.

¹³¹ *State v. Davis*, 88 Mo. 585; *King v. Baker*, 7 La. Ann. 571; *Greenwell v. Commonwealth*, 78 Ky. 320.

¹³² *Commonwealth v. Lentz*, 106 Pa. St. 643.

¹³³ *Scott v. Ryan*, 115 Ala. 587.

¹³⁴ *South v. Maryland*, 18 How. 396.

¹³⁵ *Cocking v. Wade*, 87 Md. 529.

¹³⁶ *Asher v. Cabell*, 50 Fed. Rep. 818.

excess of his duty, his principal, the sheriff and his sureties, are liable¹³⁷

§ 327. AMOUNT OF SURETIES' LIABILITY.—The surety's liability is limited to the amount named in the bond, and he cannot be held in damages for a larger amount.¹³⁸ So where the sureties of the officer have paid the full amount of the bond in damages, they are no longer liable on the bond.¹³⁹ The judgment on the bond is generally for the penal sum,¹⁴⁰ and the damages assessed according to the finding of the jury, which may not be the full amount of the bond. Of course the legal interest may be added to the penalty from the date the liability accrued.¹⁴¹

§ 328. LIABILITY OF SURETIES AFTER TERM EXPIRES.—The authorities are not uniform as to the liability of the sureties for defaults of their principal after his term expires. One line of decisions holds that where the officer's time expires, his sureties are released from further liability. Thus, where a sheriff is re-elected and fails to give a new bond, his office becomes vacant, and his sureties on his old bond are thereby discharged from liability for his malfeasance or non-feasance after his re-election and failure to qualify.¹⁴² So where an officer's time expires while he holds an execution, and he is re-elected and qualifies, and then did not return the execution according to law, the sureties on the new bond are liable, but not those on the first bond.¹⁴³ And so where it is the duty of an officer at the close of his term to deliver unexecuted processes to his successor, but he does not, and collects money and uses it himself, his sureties are not liable.¹⁴⁴

¹³⁷ *Brown v. Weaver*, 76 Miss. 7; *Cash v. People*, 32 Ill. App. 250; *Yount v. Carney*, 91 Iowa, 559.

¹³⁸ *Marcy v. Praeger*, 34 La. Ann. 544.

¹³⁹ *Bathwell v. Shiffeld*, 8 Ga. 569.

¹⁴⁰ *Turner v. Sisson*, 137 Mass. 191.

¹⁴¹ *Holmes v. Standard Oil Co.*, 183 Ill. 70.

¹⁴² *Bennett v. State*, 58 Miss. 557.

¹⁴³ *Sherrell v. Goodrum*, 3 Humph. 419.

¹⁴⁴ *State v. Morgan*, 59 Miss. 349. See, also, *State v. McCormack*, 50 Mo. 568; *Clark v. Lamb*, 78 Ala. 406.

But in other jurisdictions the sureties are liable for money paid to the officer, after the expiration of his office, for processes executed, which came into his hands before the expiration of his term of office.¹⁴⁵ He must finish the executions commenced during his term of office.¹⁴⁶

Having received money during his term of office, it is the officer's duty to pay it over to the proper party, and if he does not, he and his sureties are liable until he does, notwithstanding his term of office has expired.¹⁴⁷ The sureties of the officer are liable only for the acts of their principal during the term of office or while he is exercising the functions of his office pursuant to law.¹⁴⁸

§ 329. SURETIES' LIABILITY ON BOND OF CLERKS OF COURT.—Laws have been enacted compelling clerks of court to give bond for the faithful performance of their duties. Such bond covers misappropriation of funds given into the clerk's hands, and all ministerial duties. And the sureties on such bonds are liable for the performance of duties imposed upon him which come within the scope of his office, whether required by law enacted before or after the execution of the bond.¹⁴⁹ They are liable for money legally paid to him;¹⁵⁰ because such money is received by virtue of his office.¹⁵¹ They are also liable for omission, neglect or misconduct of the clerk.¹⁵²

When a new bond is given upon demand of the sureties, the new sureties are not liable for money received and misappropri-

¹⁴⁵ *Elkin v. People*, 3 Scam. (Ill.) 207; *State v. Roberts*, 12 N. J. L. 114.

¹⁴⁶ *Clark v. Withers*, 2 Ld. Ray. 1074; *Campbell v. Cable*, 2 Sneed, 18.

¹⁴⁷ *King v. Nichols*, 16 Ohio St. 80; *Peabody v. State*, 4 Ohio St. 387; *Governor v. Mentfort*, 1 Iredell (N. C.), 155; *Freeholders v. Wilson*, 16 N. J. L. 110; *Brobst v. Killen*, 16 Ohio St. 382.

¹⁴⁸ *People v. Foster*, 133 Ill. 426.

¹⁴⁹ *Weisenborn v. People*, 53 Ill. App. 32; 58 Ill. App. 114, 116; *Governor v. Ridgway*, 12 Ill. 14.

¹⁵⁰ *Walters-Cates v. Wilkinson*, 92 Iowa, 129; *Scott v. Hunt*, 92 Tex. 389.

¹⁵¹ *Morgan v. Long*, 29 Iowa, 434; *Swift v. State*, 63 Ind. 81; *Peebles v. Boone*, 116 N. Car. 51; *Allen v. Wood*, 2 Baxt. 301.

¹⁵² *Governor v. Dodd*, 81 Ill. 162; *Sullivan v. State*, 121 Ind. 342; *State v. Sloan*, 20 Ohio, 327; *Swalling v. King*, 5 Lea, 585; *McDonald v. Atkins*, 13 Neb. 568.

ated before they executed the new bond, unless they so stipulate; otherwise the old sureties only are liable.¹⁵³

§ 330. COMPENSATION OF CLERK.—It is often the case that a clerk's compensation is limited by statute, and he is required to account for all fees received by him in excess of that compensation. The bond in such case is so conditioned, and he and his sureties are liable for the excess collected by him,¹⁵⁴ and he and his sureties are liable for such excess not turned over to the State.¹⁵⁵

§ 331. FAILURE TO PAY OVER TO SUCCESSOR IN OFFICE OR TO PROPER PARTY.—When the law requires that each successive clerk shall receive from his predecessor all the records, money and property of the office, and the retiring clerk fails so to do, some decisions hold that suit may be instituted against him without any order of court to pay the money.¹⁵⁶ But the weight of authority is that the failure of the retiring clerk to pay out moneys to the parties in interest constitutes no breach of the bond, until there is an order from the court to pay it, and a demand under that order during the clerk's term of office.¹⁵⁷

It is generally held that it is a condition precedent to the institution of a suit on the bond of the clerk for failure to pay over to the proper parties, money collected by him during his term of office, that there must be an order from the court to pay over such moneys.¹⁵⁸ But such order is not necessary before suit when the clerk is guilty of fraud and deceit in failing to make correct statements and illegally withholding part of the money received by him.¹⁵⁹

§ 332. MONEY PAID INTO COURT ON JUDGMENT OR BY ORDER OF COURT.—Money paid into court on a judgment, is received

¹⁵³ Cullom v. Dolloff, 94 Ill. 330.

¹⁵⁴ Cullom v. Dolloff, 94 Ill. 330; Hughes v. People, 82 Ill. 78.

¹⁵⁵ United States v. Averill, 130 U. S. 335.

¹⁵⁶ Peebles v. Boone, 116 N. Car. 57.

¹⁵⁷ State v. Lake, 30 S. Car. 43.

¹⁵⁸ State v. Dent, 121 Mo. 162.

¹⁵⁹ State v. Henderson, 142 Mo. 598. See, also, Stewart v. Sholl, 99 Ga. 534.

by the clerk by virtue of his office, and upon his failure to pay over the money to the proper party, his sureties become liable for this default.¹⁶⁰ Receipt of such money, whether paid voluntarily to him or by the sheriff on execution, is an official act, and the clerk's failure to account for such money is a breach of his bond for which his sureties are liable.¹⁶¹ And so when the money is ordered paid into court for further orders, a failure to account for the same makes the clerk and his sureties liable.¹⁶² Whether such money is legal tender cannot be raised.¹⁶³

§ 333. DELINQUENCIES OF CLERKS.—The duty of approving bonds on appeal and his other official duties, are given to the clerk of the court by law. So if the clerk, in such cases, is negligent, or does not make sufficient inquiry as to the solvency of the sureties, and approves the bond, he and his sureties are liable for any damages that result from such action to the parties in interest;¹⁶⁴ and an unlawful discrimination between judgment creditors makes his sureties liable for any damages resulting;¹⁶⁵ or for failure to issue execution;¹⁶⁶ or a failure to enroll a judgment so as to become a lien;¹⁶⁷ or to make a proper entry of a judgment;¹⁶⁸ or to make an erroneous satisfaction of judgment;¹⁶⁹ or failure to enter case on the docket;¹⁷⁰ or a refusal to issue citation;¹⁷¹ or a failure to trans-

¹⁶⁰ *Morgan v. Long*, 29 Iowa, 434.

¹⁶¹ *McDonald v. Atkins*, 13 Neb. 568.

¹⁶² *Walters-Cates v. Wilkinson*, 92 Iowa, 129; *Craig v. Governor*, 3 Cold. (Tenn.) 244; *State v. Watson*, 38 Ark. 96. Compare *Waters v. Carroll*, 9 Yerg. 102; *Hardin v. Carrico*, 3 Met. (Ky.) 261.

¹⁶³ *Billings v. Teeling*, 40 Iowa, 607.

¹⁶⁴ *Billings v. Lafferty*, 31 Ill. 318; *Hubbard v. Switzer*, 47 Iowa, 681; *Brock v. Hopkins*, 5 Neb. 231; *Field v. Wallace*, 89 Iowa, 597.

¹⁶⁵ *Newbern Bank v. Jones*, 2 Dev. Eq. (N. Car.) 284.

¹⁶⁶ *Badham v. Jones*, 64 N. Car. 655.

¹⁶⁷ *Strain v. Babb*, 30 S. Car. 342.

¹⁶⁸ *State v. Dodd*, 81 Ill. 162.

¹⁶⁹ *Van Etten v. Commonwealth*, 102 Pa. St. 596.

¹⁷⁰ *Brown v. Lester*, 13 Sm. & M. (Miss.) 392.

¹⁷¹ *Anderson v. Johett*, 14 La. Ann. 624.

mit transcript;¹⁷² or to make a false certificate of record of judgment;¹⁷³ or for making a false certificate of acknowledgment.¹⁷⁴

But his sureties are not liable for withholding of moneys which he had no right to receive in his legal capacity.¹⁷⁵ And if it is not his duty to approve a bond, his sureties are not liable for his approval of a defective bond.¹⁷⁶ But his sureties are liable upon a bond executed after the receipt of money, but while unaccounted for, for non-payment of such money to the proper parties.¹⁷⁷

The clerk is a ministerial officer, and is liable for damages occasioned by his neglect in taking insufficient security on appeal bonds; if he exercises a reasonable degree of care in the performance of his official duty, he is not liable, nor his sureties, even if the security proves insufficient.¹⁷⁸ What is due care and diligence in the approval of an appeal bond, is a question of fact.¹⁷⁹

§ 334. SURETIES OF JUSTICES OF THE PEACE.—Sureties on the bond of a justice of the peace are not liable for his judicial acts, but they are liable for his neglect or misconduct of his acts in his ministerial capacity. His sureties undertake to pay on demand to every person who may be entitled thereto, all moneys which the justice may receive in his official capacity, and which he withholds. But the sureties do not undertake to pay money which the justice may obtain in some unlawful manner as by a mere trespass, unless the bond so provides.¹⁸⁰ The

¹⁷² *Collins v. McDaniel*, 66 Ga. 203.

¹⁷³ *Ziegler v. Commonwealth*, 12 Pa. St. 227.

¹⁷⁴ *Bartels v. People*, 152 Ill. 557.

¹⁷⁵ *Jenkins v. Lemonds*, 29 Ind. 294; *Bowers v. Fleming*, 67 Ind. 541; *State v. Enslow*, 41 W. Va. 744.

¹⁷⁶ *Dewey v. Kavanaugh*, 45 Neb. 233.

¹⁷⁷ *State v. Moses*, 18 S. Car. 366.

¹⁷⁸ *Brock v. Hopkins*, 5 Neb. 231; *Field v. Wallace*, 89 Iowa, 597. Compare *McNutt v. Livingston*, 7 Sm. & M. (Miss.) 641.

¹⁷⁹ *Field v. Wallace*, 89 Iowa, 597; *Brock v. Hopkins*, 5 Neb. 231.

¹⁸⁰ *Barnes v. Whitaker*, 45 Wis. 204.

bond may provide that he and his sureties shall be liable for acts committed through favor, fraud or partiality.¹⁸¹

When he receives money not in his official capacity and misappropriates it, his sureties are not liable.¹⁸² But he and his sureties are liable for notes left in his hands for collection or for money received as a justice and not as a mere agent.¹⁸³

And if the justice does not perform his ministerial acts according to law, his sureties are liable for damages that may accrue.¹⁸⁴ So where he makes a false acknowledgment, and is guilty of fraud, his sureties are liable for any injury arising.¹⁸⁵ He and his sureties are liable if he issues an attachment without the required bond, though the injury is nominal;¹⁸⁶ or if he neglects to enter judgment according to law, and injury results to the successful party;¹⁸⁷ and so if judgment is paid in without the costs of suit, and he takes out the costs contrary to the orders of the judgment creditor, he and his sureties are liable for this breach of the bond.¹⁸⁸

§ 335. POLICE OFFICER.—Police officers are not strictly public officers whose sureties are liable for their faithful performance of their duties as pertain to the public at large. So upon general principles, a party upon whom a policeman commits a tort has no right for damages against his sureties, for the reason that there is no privity of contract between him and the officer or his sureties. Being an entire stranger to the contract, it

¹⁸¹ *State v. Flinn*, 3 Blackf. (Ind.) 72; *Gowing v. Gowgill*, 12 Iowa, 495.

¹⁸² *Cressey v. Gierman*, 7 Minn. 398; *Commonwealth v. Kendig*, 2 Pa. St. 448.

¹⁸³ *Bessinger v. Dickerson*, 20 Iowa, 260; *State v. Bliss*, 19 Ind. App. 662; *Ditmars v. Commonwealth*, 7 Pa. St. 335; *Brockett v. Martin*, 11 Kan. 378; *Peabody v. State*, 4 Ohio St. 387; *Widener v. State*, 45 Ind. 244; *McCormick v. Thompson*, 10 Neb. 484; *Commonwealth v. Kendig*, 2 Pa. St. 448.

¹⁸⁴ *Place v. Taylor*, 22 Ohio St. 317.

¹⁸⁵ *McLendon v. Mortg. Co.*, 119 Ala. 518.

¹⁸⁶ *Head v. Levy*, 52 Neb. 456.

¹⁸⁷ *Larson v. Kelly*, 64 Minn. 51.

¹⁸⁸ *Hodge v. People*, 78 Ill. App. 378.

would require express legislative authority to give him a right of action thereon.¹⁸⁹

§ 336. SURETIES OF NOTARY PUBLIC.—The object of a notary's bond is to obtain indemnity against the use of official position for a wrong purpose, which is done under color of office, and which would obtain no credit except from its appearing a regular official act, and within the protection of the bond; if injury occurs it must be made good by all those who sign the bond.¹⁹⁰ Therefore, his sureties are liable for his misfeasance in knowingly certifying the acknowledgment of a grantor, who is absent and did not appear before him, and also for certifying an acknowledgment without reading it;¹⁹¹ and for a false certificate knowingly issued.¹⁹²

The holder of a bill is authorized to give full credence to a notary's certificate of demand and notice, and may look to the notary for damages resulting from its falsity, when within the scope of his official duties.¹⁹³ But the damages arising from the notary's failure to perform his official duties must proximately and directly be the result of such neglect.¹⁹⁴

The weight of authority is that when a bank receives negotiable paper for collection, and upon non-payment by debtor, the bank gives it to a notary for protest, the bank's responsibility ceases provided it exercises reasonable care in the selection of the notary.¹⁹⁵ But there are cases which hold that the bank is liable for the negligence of the notary employed by it,¹⁹⁶ but the great weight of authority is the other way.

¹⁸⁹ *Alexander v. Ison*, 107 Ga. 745.

¹⁹⁰ *People v. Pierce*, 74 Mich. 643.

¹⁹¹ *People v. Colby*, 39 Mich. 456.

¹⁹² *Scotten v. Fegan*, 62 Iowa, 236; *Rochereau v. Jones*, 29 La. Ann. 82.

¹⁹³ *Fogarty v. Finlay*, 10 Cal. 239; *State v. Meyer*, 2 Mo. App. 413; *Tevie v. Pandill*, 6 Cal. 632.

¹⁹⁴ *Oakland Sav. Bank v. Murfey*, 68 Cal. 455.

¹⁹⁵ *Baldwin v. Bank*, 1 La. Ann. 560; *Britton v. Nicolls*, 104 U. S. 766; *Warren Bank v. Bank*, 10 Cush. 582; *Baker v. Butler*, 41 Ohio St. 519; *First Nat. Bank v. Bank*, 107 Iowa, 543.

¹⁹⁶ *Montgomery Co. Bank v. Bank*, 7 N. Y. 459; *Ayrault v. Bank*, 47 N. Y. 570.

§ 337. TAX COLLECTOR.—Where the law requires absolutely a ministerial act to be done by a public officer, a neglect or refusal to do such act makes him liable to respond in damages to the extent of the injury arising from his conduct.¹⁹⁷ Hence, the neglect of a collector of his official duty in collecting taxes makes his sureties liable upon his bond.¹⁹⁸ If the statute authorizing the levying and collection of taxes is unconstitutional or otherwise invalid, the collector cannot be permitted to retain the money illegally collected under color of his office.¹⁹⁹ And the failure to pay over such money constitutes a breach of the condition of the bond and the principal and sureties are liable.²⁰⁰ The sureties are liable for funds misappropriated by their principal.²⁰¹ Thus, where a collector is continued for a second term, gives a new bond, and pays arrearage of the first term with money collected in his second term, this is a misappropriation of funds, and the sureties are liable, the obligee not knowing when receiving the money of its misappropriation.²⁰²

The liabilities of the sureties are limited by the terms of the bond, and cannot be extended beyond the reasonably necessary import of the same.²⁰³ And the collector and his sureties are

¹⁹⁷ *Amy v. Supervisors*, 11 Wall. 136.

¹⁹⁸ *People v. Smith*, 123 Cal. 70; *Palmer v. Pettingil* (Idaho), 55 Pac. Rep. 653.

¹⁹⁹ *McGuire v. Williams*, 123 N. Car. 349; *Moore v. Allegheny City*, 18 Pa. St. 55; *Connell v. Crawford Co.*, 59 Pa. St. 196; *Mayor v. Merritt*, 27 La. Ann. 568; *Pawlet v. Kelley*, 69 Vt. 398; *McLean v. State*, 8 Heisk. 22; *Clifton v. Wynne*, 80 N. Car. 145.

²⁰⁰ *Boothby v. Giles*, 68 Me. 160; *Brunswick v. Snow*, 73 Me. 179; *Sandwich v. Fish*, 2 Gray, 298; *Tunbridge v. Smith*, 48 Vt. 648; *Montpelier v. Clarke*, 67 Vt. 479.

²⁰¹ *King v. United States*, 99 U. S. 229; *Soule v. United States*, 100 U. S. 8; *United States v. Stone*, 106 U. S. 525.

²⁰² *Commonwealth v. Knettle*, 182 Pa. St. 176; *Colrain v. Bell*, 9 Met. 499; *Carpenter v. Corwith*, 62 Vt. 111; *Frownfelter v. State*, 66 Md. 80; *Lyndon v. Miller*, 36 Vt. 329; *Gwynne v. Burnell*, 7 Cl. & Fin. 572. See, also, *State v. Sooy*, 39 N. J. L. 539; *Stone v. Seymour*, 15 Wend. 20; *State v. Smith*, 26 Mo. 226.

²⁰³ *State v. Montague*, 34 Fla. 32; *United States v. Cheesman*, 3 Saw. 424.

liable for the uncollected taxes, unless some valid excuse is shown for their non-collection.²⁰⁴

Where the bond provides that the taxes shall be settled by a certain day, but such settlement is not made by the collector, a demand on him for settlement is not necessary before action is brought.²⁰⁵ It would be otherwise if the bond contained no such provision, and demand should be made before bringing action.²⁰⁶

§ 338. SUBROGATION OF SURETY ON OFFICIAL BOND.—Sureties on the bond of public officers being compelled to make good the defaults of their principal will, by the fact of payment, become equitable assignees and be subrogated to the position of the State in respect to all its securities, liens and priorities for the purpose of enforcing reimbursement from their principal.²⁰⁷ And it is immaterial how the State's right of priority originated, whether by the common law, positive statute or contract; once established that it is entitled to rank as a preferred creditor, and the same preference will be upheld by way of subrogation for the benefit of the surety.²⁰⁸ But subrogating a surety on a recognizance to the peculiar remedies which the government enjoys is against public policy, and tends to subvert the object and purpose of the recognizance, and cannot therefore be allowed.²⁰⁹ And so the surety may lose his right of subrogation by laches. Thus, where a surety has a secret lien which is held unasserted until holders of legal rights have been thrown off their guard and lose their opportunity to protect themselves, he cannot then bring it forward to the injury of those who had no notice.²¹⁰

²⁰⁴ *Montpelier v. Clarke*, 67 Vt. 479.

²⁰⁵ *McGuire v. Williams*, 123 N. Car. 349.

²⁰⁶ *Commonwealth v. McClure* (Ky.), 49 S. W. Rep. 789.

²⁰⁷ *Myers v. Miller*, 45 W. Va. 595.

²⁰⁸ *Hawker v. Moore*, 40 W. Va. 49; *Hook v. Richeson*, 115 Ill. 431; *Crawford v. Richeson*, 101 Ill. 351; *Boltz's Estate*, 133 Pa. St. 77; *Turner v. Teague*, 73 Ala. 554; *Irby v. Livingston*, 81 Ga. 281; *Robertson v. Trigg*, 32 Gratt. 76; *Hunter v. United States*, 5 Pet. 173; *Orem v. Wrightson*, 51 Md. 34.

²⁰⁹ *United States v. Ryder*, 110 U. S. 730.

²¹⁰ *Gring's Appeal*, 89 Pa. St. 336.

CHAPTER XIII.

GUARANTY.

§ 339. DEFINITION.—A guaranty is an undertaking by one person that another shall perform his contract or fulfill his obligation, and if he does not the guarantor will do it himself.¹ In a legal and commercial sense it is an undertaking to be answerable for the payment of some debt or the due performance of some contract or duty by some person who himself remains liable for his own default.² A guaranty is an undertaking as in case of suretyship, but a conditional one, to answer for the debt or default or miscarriage of another. Accordingly in a conditional guaranty the guarantor contracts to pay if, by the reasonable exercise of due diligence, the debt cannot be made out of the principal.³ The liability of a guarantor is co-extensive with that of his principal, unless it is expressly limited.⁴

While the undertaking of a guarantor is technically different from that of a surety,⁵ yet the contract of guaranty is the obligation of surety.⁶ Both are accessory; a guaranty is a secondary, and suretyship a primary, obligation.⁷ The undertaking of a guarantor is his own separate, independent contract, distinct from that of the principal debtor.⁸

The contract of an indorser is primary, and that of transfer; a guaranty is that of a security;⁹ a guarantor is held to a stricter measure of responsibility.¹⁰

¹ *Atwood v. Lester*, 20 R. I. 660; *Gridley v. Capen*, 72 Ill. 13.

² *McLaren v. Watson*, 26 Wend. 425, 435; *Andrews v. Tedford*, 37 Iowa, 315.

³ *Welsh v. Ebersole*, 75 Va. 651, 656.

⁴ *Hooper v. Hooper*, 81 Md. 155; *Richardson v. Allen*, 74 Ga. 719.

⁵ *Kramp v. Hatz*, 52 Pa. St. 525.

⁶ *Davis v. Wells*, 104 U. S. 159.

⁷ *Hooper v. Hooper*, 81 Md. 155.

⁸ *Abbrett v. Brown*, 131 Ill. 108.

⁹ *San Diego First Nat. Bank v. Babcock*, 94 Cal. 102.

¹⁰ *Arents v. Commonwealth*, 18 Gratt. 750.

A guaranty may be retrospective in its operation so as to embrace debts or contracts where it appears that such was the intention of the parties;¹¹ but such construction can only be given to a guaranty, where by express words, or by necessary implication, it clearly appears to be the intent of the parties to embrace past contracts.¹²

§ 340. CLASSIFICATION OF GUARANTIES AS TO THEIR NATURE.—Guaranties are classified into general or special, limited or continuing, absolute or conditional. Upon the terms of a general contract any person is entitled to advance money or incur liability upon complying with the provisions, and may then enforce the same as though he was specially named therein.¹³ A special guaranty is addressed to a particular individual or firm, and such individual or firm alone has the right to act upon it.¹⁴ A limited or continuing guaranty may be for a single act or continuing.¹⁵ Where the guaranty looks to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty.¹⁶ Guaranties without limitation as to time or amount will be considered to refer to a single transaction.¹⁷ An absolute guaranty is an unconditional promise of payment or performance on default of the principal; and the guarantee may proceed at once against the guarantor on default of the principal without prior notice to the guarantor. A guaranty is conditional where there is some extraneous event beyond the mere default of the principal by which the guaranty becomes binding, and the liability does not attach immediately upon non-payment

¹¹ *Hammond v. Johnson*, 20 Ill. 367; *People v. Lee*, 104 N. Y. 441.

¹² *People v. Lee*, 104 N. Y. 441; *Pritchett v. Wilson*, 39 Pa. St. 421. See sec. 4.

¹³ *Evansville Nat. Bank v. Kaufman*, 93 N. Y. 27; *Wheeler v. Mayfield*, 31 Tex. 395.

¹⁴ *Peoria Second Nat. Bank v. Diefendorf*, 90 Ill. 396; *Mitchell v. Railton*, 45 Mo. App. 27.

¹⁵ *Birdsall v. Heacock*, 32 Ohio St. 184.

¹⁶ *Twohy v. McMurran*, 57 Minn. 242.

¹⁷ *Knowlton v. Hersey*, 16 Me. 345.

or non-performance of the principal. It is necessary to fix the liability on the guarantor that there should be notice or acceptance of the guarantee, and notice of the principal's default and reasonable diligence in exhausting reasonable remedies against the principal.¹⁸

§ 341. CONSIDERATION.—The contract of guaranty not under seal requires a consideration to support it, though the consideration need not be in money; so a consideration may arise from some injury or inconvenience to one party, or from some benefit to the other.¹⁹ If the debt of the principal debtor be pre-existing, then there must be a new and distinct consideration to sustain the promise of the guarantor. But if the obligation of the principal debtor be founded upon a valuable consideration, and after it was incurred, or before that time, the promise of the guarantor is made and entered into as the inducement for giving the guaranty, then the consideration for the principal debt is considered as a valuable consideration also for the undertaking of the guarantor.²⁰ If the promise is in the nature of an original undertaking to pay a debt to a third party and is founded upon a valuable consideration received by the promisor himself, it is sufficient.²¹

Extension of time to pay the debt is a sufficient consideration to support the guaranty of a stranger of the payment of the new obligation.²² So a forbearance by the creditor to sue the principal debtor for a debt due is a sufficient consideration to support the guaranty.²³ And the extension of time for the performance of an agreement or for the payment of a debt forms a sufficient

¹⁸ *City Bank v. Hopson*, 53 Conn. 455; *Bearusley v. Hawes*, 71 Conn. 39.

¹⁹ *Robinson v. Hyer*, 35 Fla. 544; *Adams v. Huggins*, 78 Mo. App. 219; *Conover v. Stillwell*, 34 N. J. L. 54; *Hirsch v. Carpet Co.*, 82 Ill. App. 234; *Bickford v. Gibbs*, 8 Cush. 156.

²⁰ *Bassheans v. Rowe*, 46 Mo. 54.

²¹ *Wilson v. Bevans*, 58 Ill. 232; *Brown v. Brown*, 47 Mo. 130; *Baker v. Bradley*, 42 N. Y. 316; *Uhler v. Bank*, 64 Pa. St. 406.

²² *Faulkner v. Gilbert* (Neb.), 77 N. W. Rep. 1072.

²³ *Aldershaw v. King*, 2 Hurl. & N. 517.

consideration to support the contract.²⁴ But a promise to forbear to prosecute a claim which has no foundation forms no consideration.²⁵ An agreement to withdraw a suit against the principal is a sufficient consideration.²⁶ The promise to pay the debt of another in consideration of forbearance is not binding unless accepted by the other party. There must be a mutual agreement, the consideration being a promise for a promise; both parties must be bound.²⁷

The promise to forbear will be void unless it provides for some actual delay and affords a means of determination of how long that delay is to continue,²⁸ because a promise to forbear in general, without adding any particular time, is to be understood a total forbearance.²⁹ While the promise to pay the debt of another must be accepted by the other party to make it binding, yet acts of the creditor may show that he has relied upon the promise, though he made no declaration to that effect, and hence, the promise is binding.³⁰

A consideration arising from some injury or inconvenience to one party or from some benefit to the other is recognized a legal consideration. Thus, if A, for the purpose of strengthening the credit of B, agrees with C to become responsible for goods to be sold in the future by C to B, and C accepts the agreement and acts upon it by selling goods to B, there is every element of a valid consideration, because C has parted with his property upon the faith of A's promise, and B, at A's express or implied

²⁴ *Underwood v. Hossack*, 38 Ill. 209; *Fuller v. Scott*, 8 Kan. 25.

²⁵ *Cabot v. Haskins*, 3 Pick. 83. Compare *Hamaker v. Eberly*, 2 Binn. (Pa.) 506.

²⁶ *Worcester Sav. Bank v. Hill*, 113 Mass. 25; *Harris v. Vendbly*, L. R. 7 Exch. 235.

²⁷ *Shupe v. Galbreathe*, 32 Pa. St. 19; *Clark v. Russel*, 3 Watts. 213; *Snyder v. Leibengood*, 4 Pa. St. 305; *Semple v. Pink*, 1 Exch. 74.

²⁸ *Shupe v. Galbreathe*, 32 Pa. St. 19; *Elling v. Vanderlyn*, 4 Johns. Ch. 237.

²⁹ *Hamaker v. Eberly*, 2 Binn. (Pa.) 510; *Clark v. Russel*, 3 Watts. 213.

³⁰ *Downing v. Funk*, 5 Rawle, 69; *Weaver v. Wood*, 9 Pa. St. 220.

request, has obtained a benefit by means of such promise.³¹ There must be a consideration;³² a seal imports a consideration.³³ Although it is a general rule at common law, a seal imports a consideration, yet equity disregards such form and looks to the reality, and requires an actual consideration, and permits the want of it to be shown, notwithstanding the seal. If at common law the seal imports unimpeachable consideration, it is in cases where the seal is itself legally affixed in the first instance, and not in cases of forgery or without any lawful authority.³⁴

§ 342. EXECUTORY CONSIDERATION.—As a general rule the guaranty of a pre-existing debt of another is not binding on the guarantor without a new and independent consideration to support it; but when the guaranty, though executed after the debt was created, is connected with, and the inducement of, the original credit or the result of a previous promise by the guarantor, upon the faith of which the credit was obtained by the original debtor, it requires no new or independent consideration to render it valid, but it is a part of the original transaction and the consideration upon which it was given.³⁵

Where the guaranty is made at the same time with the principal contract, and becomes an essential ground of the credit given to the principal, there need not be any other consideration than that moving between the creditor and the original debtor

³¹ *Ferst v. Blackwell*, 39 Fla. 621; *Wellington v. Apthorp*, 145 Mass. 69; *Beakes v. Da Cunha*, 126 N. Y. 293; *Train v. Gold*, 5 Pick. 380; *Williams v. Perkins*, 21 Ark. 18; *McDougald v. Development Co.*, 117 Cal. 87; *Armstrong v. Canal Co.*, 14 Utah, 450; *Lennox v. Murphy*, 171 Mass. 370.

³² *Klein v. Currier*, 14 Ill. 237; *Tenney v. Prince*, 4 Pick. 385; *Macfarland v. Heim*, 127 Mo. 327.

³³ *Snyder' Estate*, 7 Kulp (Pa.), 409; *Antisdel v. Williamson*, 37 App. Div. 167.

³⁴ *Hale v. Dresser*, 73 Minn. 277. See sec. 344, et seq.

³⁵ *Standley v. Adames*, 36 Miss. 434; *Gillingham v. Boardman*, 29 Me. 79; *Pam v. Stackhouse*, 38 Pa. St. 302; *McNaught v. McClaughry*, 42 N. Y. 22.

under the principal contract.³⁶ But where the guaranty is made subsequent to the creation of the debt and was not an inducement to it, the consideration of the original debt will not support it, so there must be some further consideration having an immediate respect to such liability;³⁷ and it is sufficient that there be something moving toward the principal debtor.³⁸

§ 343. MORAL OBLIGATION.—The promise to pay the debt of another, based upon a moral obligation, is invalid. Thus, the fact that goods were bought for the use of a certain person, does not afford a moral obligation as will support his parol promise to pay for them, where he is under no legal obligation to pay for the same, and no arrangement is made for discharging the primary debtor,³⁹ because an express promise can only revive a precedent valid consideration which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but it can give no original right of action if the obligation on which it was founded never could have been enforced at law, though not barred by legal maxim or statute provision.⁴⁰

A moral obligation will not support a voluntary written guaranty, unless there was once a legal consideration.⁴¹

§ 344. AS TO CONSIDERATION, GUARANTIES ARE OF TWO KINDS.—Guaranties may be classified as follows: (1) Where the consideration passes wholly at one time; such are not terminated by death. (2) Where the consideration passes at different times and is separable; such are revocable, and are terminated by death and notice of death.⁴²

³⁶ *Dillman v. Nadelhoffer*, 160 Ill. 121; *Winans v. Cable, etc., Co.*, 48 Kan. 777; *Lennox v. Murphy*, 171 Mass. 370; *Osborne v. Gullikson*, 64 Minn. 218; *Glenn v. Lehn*, 54 Mo. 45; *Wood v. Tunnell*, 74 N. Y. 38.

³⁷ *Parkhurst v. Vail*, 73 Ill. 343; *Briggs v. Latham*, 36 Kan. 209; *Peck v. Harris*, 57 Mo. App. 467; *Draper v. Snow*, 20 N. Y. 331.

³⁸ *Dahlman v. Hammel*, 45 Wis. 466; *Bickford v. Gibbs*, 8 Cush. 156.

³⁹ *Hendricks v. Robinson*, 56 Miss. 695.

⁴⁰ *Wennall v. Adney*, 3 Bos. & P. 247, 253 note.

⁴¹ *Martin's Estate*, 131 Pa. St. 638; *Pam v. Stackhouse*, 38 Pa. St. 302.

⁴² *National Eagle Bank v. Hunt*, 16 R. I. 148. See sec. 346.

§ 345. GUARANTIES WHERE THE CONSIDERATION IS ENTIRE.

—In this class of guaranties the consideration is entire, and passes wholly at one time: Thus, where a person enters into a guaranty that, in consideration of the lessor granting a lease to a third person, he will be answerable for the performance of the covenants. The moment the lease is granted, there is nothing more for the lessor to do; and such guaranty as that of necessity runs throughout the duration of the lease. The lease is intended to be a guaranteed lease and it is impossible to say that the guarantor could put an end to the grant at his pleasure, or that it could be put an end to by his death contrary to the intention of the parties.⁴³ And of course if the guarantor dies his estate is responsible for the defaults of his principal. So where a party, in consideration that an employer would take into his service a certain individual as collector and clerk in a responsible position, would be answerable for the fidelity of the employee so long as he continued in that service, such guaranty cannot be put an end to so long as the service continues. The consideration is admitting the employee into the service of the employer in that capacity, and that being done, it becomes a guaranteed service so long as the clerk, or employee, remains in that position. The guaranty, therefore, necessarily continues until the service is ended.⁴⁴ In this class of cases, the consideration passes entire at the time, and is not therefore severable.⁴⁵

§ 346. GUARANTY WHERE THE CONSIDERATION PASSES AT DIFFERENT TIMES AND IS SEPARABLE.—In this class of cases the consideration passes at different times, and is therefore separable or divisible. Such guaranty may be revoked as to subsequent transactions by the guarantor upon notice to that effect,

⁴³ *Lloyds v. Harper*, 16 Ch. D. 290.

⁴⁴ *Calvert v. Gordon*, 3 Man. & Ry. 124.

⁴⁵ *Green v. Young*, 8 Me. 14; *Royal Ins. Co. v. Davies*, 40 Iowa, 469; *Rapp v. Ins. Co.*, 113 Ill. 390; *Moore v. Wallis*, 18 Ala. 458; *Hall v. Ocha*, 34 App. Div. 103; *Kernachan v. Murray*, 111 N. Y. 306.

and it determines by his death and notice of that event.⁴⁶ These cases are generally where a guaranty is given to secure the balance of a running account at a bank, or the balance of a money account for goods supplied. In these cases the consideration is supplied from time to time, and it is reasonable to hold, unless the guaranty stipulates to the contrary, that the guarantor may at any time terminate the guaranty. He remains answerable for all the advances made or of goods supplied upon his guaranty before notice to terminate it is given. A notice of the death of the guarantor is notice to terminate the guaranty, and has the same effect as a notice given in the lifetime of the guarantor that he would put an end to it.⁴⁷ In England such guaranty is terminated, not by the death of the guarantor, but by notice of his death.⁴⁸ But in the United States the death of the guarantor operates as a revocation of it, and the person holding it cannot recover against his executor or administrator for goods sold after his death.⁴⁹

§ 347. INDORSEMENT BEFORE AND AFTER DELIVERY OF NOTE.—The statute often gives the status of a party signing a note before and after delivery. In Missouri a third party who indorses a note after delivery to the payee becomes a guarantor.⁵⁰ But a party contracting to assume the liability of an indorser, cannot be held as a guarantor.⁵¹ If he indorses before delivery

⁴⁶ *Hyland v. Habich*, 150 Mass. 112; *Jordan v. Dobbins*, 122 Mass. 168; *Offord v. Davies*, 12 C. B., N. S. 748; *Coulthart v. Clementson*, 5 Q. B. Div. 42; *Menard v. Scudder*, 7 La. Ann. 385; *National Eagle Bank v. Hunt*, 16 R. I. 148.

⁴⁷ *Coulthart v. Clementson*, 5 Q. B. D. 42; *Harris v. Fawcett*, L. R. 15 Eq. 311. Compare *Bradbury v. Morgan*, 1 H. & C. 249, decision questioned in *Harris v. Fawcett*, L. R. 15 Eq. 311, 313, 8 Ch. App. 866, and was not regarded in *Coulthart v. Clementson*, 5 Q. B. D. 42.

⁴⁸ *Coulthart v. Clementson*, 5 Q. B. D. 42, 47; *Lloyd v. Harper*, 16 Ch. D. 290, 314.

⁴⁹ *Jordan v. Dobbins*, 122 Mass. 168; *Hyland v. Habich*, 150 Mass. 112; *Aitken v. Lang* (Ky.), 51 S. W. Rep. 154; *National Eagle Bank v. Hunt*, 16 R. I. 148.

⁵⁰ *Adams v. Huggins*, 73 Mo. App. 140.

⁵¹ *Tatum v. Brown*, 23 Miss. 760; *Russell v. Clarke*, 7 Cranch, 69.

to the payee, the presumption is that he assumed the liability of a guarantor, which may be rebutted by proof that the agreement between the parties was different,⁵² as between the original parties, the payee still holding the note.⁵³

But the decisions upon this subject are unreconcilable. The United States Supreme Court holds that when a promissory note made payable to a particular party or order, is first indorsed by a third person, that is, before indorsed by the payee, such an indorser is an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties.⁵⁴

In many of the States such indorser is held *prima facie* liable as a guarantor.⁵⁵ Other courts hold that such indorser is presumably a second indorser, because in the absence of evidence to the contrary the indorsement is for the accommodation of the payee, and is a second indorsement requiring the indorsement of the payee to make it operative.⁵⁶ Still other courts hold that such indorser is *prima facie* liable as joint maker or surety.⁵⁷

Many cases affirm the rule that if one not the payee indorses his name in blank on a negotiable note before it is indorsed by

⁵²Eberhart v. Page, 89 Ill. 550.

⁵³Milligan v. Holbrook, 168 Ill. 343; De Witt Co. Bank v. Nixon, 125 Ill. 615.

⁵⁴Rey v. Simpson, 22 How. 341; Good v. Martin, 95 U. S. 90.

⁵⁵Lincoln v. Hinsey, 51 Ill. 437; Stowall v. Raymond, 83 Ill. 120; Clark v. Merriam, 25 Conn. 576; Osborne v. Gullikson, 64 Minn. 218; Fuller v. Scott, 8 Kan. 32; Seymour v. Mickey, 15 Ohio St. 515; Crooks v. Tully, 50 Cal. 673; Knight v. Dunsmore, 12 Iowa, 35; Milligan v. Holbrook, 168 Ill. 343; Peterson v. Russell, 62 Minn. 220; Orrick v. Colston, 7 Gratt. (Va.) 189; Arnold v. Bryant, 8 Bush, 668; Chandler v. Westfall, 3 Tex. 477.

⁵⁶Coulter v. Richmond, 59 N. Y. 478; Moore v. Cross, 19 N. Y. 27; Arnott v. Symonds, 85 Pa. St. 99; Cady v. Shepard, 12 Wis. 639; Phelps v. Vischer, 50 N. Y. 74; Browning v. Merritt, 61 Ind. 425.

⁵⁷Spaulding v. Putnam, 128 Mass. 363; Sylvester v. Downer, 20 Vt. 355; Perkins v. Barstow, 9 R. I. 907; Atwood v. Lester, 20 R. I. 660; Baker v. Robinson, 63 N. Car. 191; Leonard v. Wilder, 38 Me. 265; Schley v. Merritt, 37 Md. 352; Logan v. Ogden, 101 Tenn. 392; Good v. Martin, 2 Colo. 218; 95 U. S. 90; Nathan v. Sloan, 34 Ark. 524; Barr v. Mitchell, 7 Oreg. 346.

the payee, and before it is delivered to take effect as a promissory note, it might be presumed that he intended to give it credit by becoming liable to pay it, either as a guarantor or as an original promisor.⁵⁸ If the contract of indorsement was made at the inception of the note, it is presumed to have been made for the same consideration and a part of the original contract expressed by the note. If made subsequently to the date of the note and without the prior indorsement by the payee, it will be presumed that it was not made for the same consideration, and the party, if liable at all, will be regarded as a guarantor, and such contract of guaranty of a debt of a third person must be in writing, and there must be a sufficient proof of the consideration.⁵⁹ This is the rule where the third party indorses the note before the payee. But where a third person indorses the note after a prior indorsement by the payee, the law presumes it to have been done in aid of the negotiation of the note, and the party may be regarded as a subsequent indorser, the rule being that if the indorsement is without date it will be presumed to have been made at the inception of the note.⁶⁰

And it is further held that in the irregularities in the execution of a promissory note the maker and such indorser are both to be deemed original promisors, and the note a joint and several promissory note to the payee, although as between the maker and the third party, they stand in the relation of principal and surety.⁶¹ This rule should be applied where the third party indorses his name in blank on the note at the time when it was made and before it was indorsed by the payee. But the rule may be otherwise if the party actually wrote his name at a sub-

⁵⁸ *Bryant v. Eastman*, 7 Cush. 111; *Benthal v. Judkins*, 13 Met. 265; *Colbun v. Averill*, 30 Me. 310.

⁵⁹ *Brewster v. Silence*, 8 N. Y. 207; *Leonard v. Vredenburg*, 8 Johns. 29; *Hall v. Farmer*, 5 Denio, 484.

⁶⁰ *Ranger v. Carey*, 1 Met. 309; *Noxon v. De Wolf*, 10 Gray, 43; *Collins v. Gilbert*, 94 U. S. 753.

⁶¹ *Sylvester v. Downer*, 20 Vt. 355; *Lewis v. Harvey*, 18 Mo. 746.

sequent period, unless it was done in compliance with an agreement made before the note was executed.⁶²

The rule undoubtedly should be, that where a promissory note is made payable to a particular person or order, and is first indorsed by a third person, such third person should be regarded as an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place, when the statute does not give the status of the third party.

If a person puts his name in blank on the back of a note at the time it was made, and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note,⁶³ when not controlled by statute. But if the indorsement was subsequent to the making of the note and to the delivery of the same to take effect, and a third person puts his name on the back of the note at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as a guarantor where there is legal proof of consideration for the promise, unless it is shown that he was connected with the inception of the note. But if the note was intended for discount, and he indorses it with the understanding of all the parties that his indorsement should be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser, in the commercial sense, and as such would clearly be entitled to the privileges which belong to such an indorser.

In the interpretation of the contract, whether the party so indorsing is an original promisor, guarantor, or indorser, the interpretation ought to be such as will carry into effect the intention of the parties, and proof of facts and circumstances which took

⁶² *Hawkes v. Phillips*, 7 Gray, 284; *Leonard v. Wilder*, 36 Me. 265; *Champion v. Griffith*, 13 Ohio, 228.

⁶³ *Schneider v. Schiffman*, 20 Mo. 571; *Logan v. Ogden*, 101 Tenn. 392; *Irish v. Cutter*, 31 Me. 536.

place at the time of the transaction should be admissible to aid in the interpretation of the language employed.⁶⁴

§ 348. OFFER AND ACCEPTANCE.—When notice should be given as to acceptance of an offer of guaranty, it is of importance in reference to the liability of the guarantor. When an instrument in writing resolves itself into a promise or undertaking on the part of the person executing, to do a particular thing which another is bound to do, in the event such other person does not perform the act himself, it is an original undertaking, and not a collateral guaranty; it is in the nature of suretyship, and the person bound by it must take notice of the default of the principal.⁶⁵ In a strict guaranty, the guarantor does not undertake to do what the principal is bound to do, but he undertakes, in the event of the principal's failure, to do what he has promised, to pay damages for such failure. The guarantor promises to pay such damages as result from the principal's default. A surety undertakes to do a particular thing if the principal does fail.⁶⁶

The contract of guaranty is his own separate undertaking, in which the principal does not join, and is not a joint engagement with his principal.⁶⁷ Where the guaranty is for the fulfillment of a contract already made, or for one executed contemporaneously with the contract of guaranty, or for the payment of an existing debt, or where the contract of guaranty is upon a consideration distinct from the credit extended to the principal debtor, and which moves directly between guarantor and guarantee, notice of acceptance is not necessary. In such cases the acceptance of the guaranty and the performance of the con-

⁶⁴ *Denton v. Peters*, L. R. 5 Q. B. 475; *Cavazos v. Trevine*, 6 Wall. 773; *Shore v. Wilson*, 9 Cl. & F. 352; *Clayton v. Grayson*, 4 Nev. & M. 602; *Hopkins v. Leek*, 12 Wend. 105. See sec. 36.

⁶⁵ *Furst v. Black*, 111 Ind. 308; *Reigart v. White*, 52 Pa. St. 438; *Woods v. Sherman*, 71 Pa. St. 100; *Riddle v. Thompson*, 104 Pa. St. 320.

⁶⁶ *Nading v. McGregor*, 121 Ind. 465.

⁶⁷ *Davis Sewing Mach. Co. v. Richards*, 115 U. S. 524.

sideration upon which it rests make the contract complete and enforceable.⁶⁸

The rule requiring notice by the guarantee of his acceptance of a guaranty and his intention to act under it, applies only where the instrument in legal effect is merely an offer or proposal; then notice of such acceptance is necessary.⁶⁹ But in the case of an absolute guaranty, and not a mere offer of guaranty, notice of acceptance by the guarantee is not necessary.⁷⁰ Ordinarily there is no occasion to notify the guarantor of the acceptance of an offer of guaranty, for doing of the act specified in the offer is a sufficient acceptance. But when the guarantor would not know of himself from the nature of the transaction whether the offer had been accepted or not, he is not bound without reasonable notice of the acceptance seasonably given after the performance which constitutes the consideration.⁷¹ And it is held that notice is not necessary, even if the guaranty is made at the request of the guarantee,⁷² though other courts hold that notice of acceptance is necessary in such cases.⁷³

Guaranties of performance and payment are absolute and not

⁶⁸ *Davis v. Wells*, 104 U. S. 159; *Cooke v. Orne*, 37 Ill. 186.

⁶⁹ *Davis v. Wells*, 104 U. S. 159; *Field v. Maish*, 85 Ill. App. 164; *Lamb v. Carley*, 35 App. Div. 503; *Sears v. Swift*, 66 Ill. App. 496.

⁷⁰ *Platter v. Green*, 26 Kan. 252; *Jackson v. Yandes*, 7 Blackf. (Ind.) 536; *Case v. Howard*, 41 Iowa, 479; *Crittenden v. Fiske*, 46 Mich. 70; *Maynard v. Morse*, 36 Vt. 617; *Powers v. Bumeratz*, 12 Ohio, St. 293; *Evans v. McCormick*, 167 Pa. St. 247; *Bryant v. Stout*, 16 Ind. App. 380; *Paige v. Parker*, 8 Gray, 211; *Bank v. Sinclair*, 60 N. H. 100; *Howe v. Nicketes*, 22 Me. 175; *Globe Printing Co. v. Bickle*, 73 Mo. App. 499; *New Haven Co. Bank v. Mitchell*, 15 Conn. 206; *Douglass v. Howland*, 24 Wend. 35; *Standard Oil Co. v. Hoese* (Neb.), 78 N. W. Rep. 292; *Ferst v. Blackwell*, 39 Fla. 621; *Bishop v. Eaton*, 161 Mass. 496; *Lemp v. Armengol*, 86 Tex. 690; *Smith v. Dann*, 6 Hill (N. Y.), 543; *Wright v. Griffith*, 121 Ind. 478; *Neagle v. Sprague*, 63 Ill. App. 25; *Sears v. Swift*, 66 Ill. App. 496.

⁷¹ *Bishop v. Eaton*, 161 Mass. 496; *Babcock v. Bryant*, 12 Pick. 133; *Sears v. Swift*, 66 Ill. App. 496.

⁷² *Davis v. Wells*, 104 U. S. 159; *Davis Sewing Mach. Co. v. Richards*, 115 U. S. 524.

⁷³ *Evans v. McCormick*, 167 Pa. St. 247; *Gardner v. Lloyd*, 110 Pa. St. 278; *Kay v. Allen*, 9 Pa. St. 320; *German Sav. Bank v. Roofing Co.* (Iowa), 51 Cent. L. Journal, 428, and note.

collateral. Unlike the contract of an indorser, there is no condition as to demand and notice of default annexed to a contract of guaranty of payment or of performance. Such a guaranty is an absolute promise that the principal will perform in accordance with the provisions of his contract. It is the business of the guarantor to inform himself as to the conduct of the principal. There is some conflict to this doctrine, but it is the true rule, because the guarantor makes an absolute promise that a particular thing shall be done, and thereby assumes an active, absolute duty to see that it is done and must, at his peril, perform the promise. And while the guarantee, from his situation, possesses better means of knowing of the default of the principal than the guarantor, yet the latter has ample means of knowing the facts, and must inform himself and not rely upon the guarantee, who owes no duty to the guarantor except to act in the utmost good faith, and not be guilty of laches to the guarantor's injury.⁷⁴

In an absolute guaranty, notice of default is not necessary to be given to the guarantor to hold him liable.⁷⁵ But when the instrument is merely an offer or a proposition, then notice of the acceptance of the guaranty is necessary.⁷⁶ Suit is not necessary in any jurisdiction against the principal debtor, when the guaranty is absolute, in order to fix the liability of the guarantor.⁷⁷

⁷⁴ *Hubbard v. Haley*, 96 Wis. 578; *Mallory v. Lyman*, 3 Pin. (Wis.) 443; *Hyman v. Dooley*, 77 Md. 162; *Wise v. Miller*, 45 Ohio St. 388.

⁷⁵ *Taylor v. Tolman Co.*, 47 Ill. App. 264; *Valtz v. Harris*, 40 Ill. 155; *Nading v. McGregor*, 121 Ind. 465; *Carmen v. Elledge*, 40 Iowa, 409; *Crittenden v. Fiske*, 46 Mich. 70; *Globe Printing Co. v. Bickle*, 73 Mo. App. 499; *Lininger, etc., Co. v. Wheat*, 49 Neb. 567; *City Nat. Bank v. Phelps*, 86 N. Y. 484. Compare *Evans v. McCormick*, 167 Pa. St. 247.

⁷⁶ *Davis v. Wells*, 104 U. S. 159; *Cooke v. Orne*, 37 Ill. 186; *Scribner v. Rutherford*, 65 Iowa, 551; *De Cramer v. Anderson*, 113 Mich. 578; *Field v. Maish*, 85 Ill. App. 164.

⁷⁷ *Benny v. Crane*, 80 Ill. 244; *Roberts v. Riddle*, 79 Pa. St. 468; *Cole v. Bank*, 60 Ind. 350; *Flentham v. Steward*, 45 Neb. 640; *Petersen v. Russell*, 62 Minn. 220; *German Sav. Bank v. Drake* (Iowa), 79 N. W. Rep. 121, Louisiana, etc., *R. R. Co. v. Dillard*, 51 La. Ann. 1484; *Maury v. Waxelbaum* (Ga.), 33 S. E. Rep. 701.

§ 349. **GUARANTY OF PAYMENT.**—Guaranty of payment may be made on the back of the instrument or by a separate writing, and whether it be an absolute or conditional contract is not settled. One line of cases hold that it is an absolute contract, and on default the guarantor need not be notified in order to hold him.⁷⁸

In other jurisdictions a guaranty is considered as conditional, and the guarantor must be given notice at once of the non-payment, in order to hold him.⁷⁹ The cases cannot be reconciled.

§ 350. **CONDITIONAL GUARANTY.**—The guarantor may sign the contract with a condition annexed. Thus, where the guarantor becomes such after the delivery of a note upon a condition, and the condition is not complied with, the contract is invalid.⁸⁰ So a party guaranteeing a note upon condition that other persons shall also become guarantors, the payee agreeing to such condition, is released if the other parties do not sign.⁸¹ If the condition is complied with the contract is valid. And if one signs upon a condition that a counter agreement will be executed, he is not entitled to notice of such execution, which makes it absolute.⁸² An absolute guaranty is an unconditional undertaking on the part of the guarantor that the maker will pay the note

⁷⁸ *Donley v. Camp*, 22 Ala. 659; *City Sav. Bank v. Hopson*, 53 Conn. 453; *Hance v. Miller*, 21 Ill. 636; *Studebaker v. Cody*, 54 Ind. 586; *Levi v. Mendell*, 1 Duv. (Ky.) 78; *Roberts v. Hawkins*, 70 Mich. 566; *Hungerford v. O'Brien*, 37 Minn. 306; *Baker v. Kelly*, 41 Miss. 696; *Beardsley v. Hawes*, 71 Conn. 39; *Wright v. Dyer*, 48 Md. 525; *Allen v. Rightmere*, 20 Johns. 365; *Clay v. Edgerton*, 19 Ohio St. 549; *Taylor v. Ross*, 3 Yerg. 330; *Smith v. Ide*, 3 Vt. 290.

⁷⁹ *Foote v. Brown*, 2 McLean, 369; *Barrett v. May*, 2 Bailey (S. Car.) L. 1; *Crooks v. Tully*, 50 Cal. 254; *Erwin v. Lambon*, 1 Harr. (Del.) 125; *Newton Wagon Co. v. Diers*, 10 Neb. 284; *Rockford Sendon Nat. Bank v. Gaylord*, 34 Iowa, 246; *Tolbot v. Gay*, 18 Pick. 563; *Globe Bank v. Small*, 25 Me. 366.

⁸⁰ *Eaton v. Foster*, 66 Ill. App. 486.

⁸¹ *Belleville Sav. Bank v. Bornman*, 124 Ill. 200; *State Bank v. Burton-Gardner Co.*, 14 Utah, 420.

⁸² *Lennox v. Murphy*, 171 Mass. 370.

or other debt. A conditional guaranty is an undertaking to pay if payment cannot, by reasonable diligence, be obtained from the principal.⁸³

§ 351. GUARANTY OF ILLEGAL CONTRACTS.—A guaranty of an illegal contract is void. If the guaranty is to secure the performance of an unlawful act it is invalid.⁸⁴

A guaranty may be limited. So the fact that a note provides for a certain rate of interest, does not make the contract of guaranty illegal, because it provides for a less rate of interest; such difference in the rate of interest does not create a repugnancy between the note and the guaranty.⁸⁵

An absolute guarantor is liable for a note which is purchased by an innocent party on the strength of the guaranty, though the note is invalid.⁸⁶ And the same rule applies to a certificate of deposit, if it is valid upon its face, and its invalidity is for matters *dehors* its face.⁸⁷ And the guarantor will be bound although some of the prior parties' names to the note are forged.⁸⁸

In some States a guaranty made on Sunday is void;⁸⁹ but in others a contract made on Sunday is valid;⁹⁰ and such is the common law rule.⁹¹ So if a contract of guaranty or any other is void if made on Sunday, it is so by statutory provision.

§ 352. DEFAULT OF PAYMENT—NOTICE TO GUARANTOR.—In the case of collateral continuing guaranty for the payment of goods to be thereafter sold, a guarantee who, from time to time, sells goods on the faith of the guaranty, must give the guarantor reasonable notice of defaults of payment on the part

⁸³ *Beardsley v. Hawes*, 71 Conn. 39; *Cowles v. Peck*, 55 Conn. 251.

⁸⁴ *Howard v. Smith*, 91 Tex. 8; *Jack v. Sinsheimer*, 125 Cal. 563.

⁸⁵ *Cozzens v. Brick Co.*, 166 Ill. 213.

⁸⁶ *Holm v. Jamieson*, 173 Ill. 295.

⁸⁷ *Purdy v. Peters*, 35 Barb. 239.

⁸⁸ *Veazie v. Willis*, 6 Gray, 90.

⁸⁹ *Carrick v. Morrison* (Del.), 42 At. Rep. 447.

⁹⁰ *Richmond v. Moore*, 107 Ill. 429.

⁹¹ *Drury v. Defontaine*, 1 Taut. 136.

of the principal debtor; and the guarantor will be discharged from liability so far as he may sustain loss and damages resulting from a failure of the guarantee to give such notice. But if such notice can result in no benefit to the guarantor, and no injury results to him from failure to give such notice, such omission on the part of the guarantee will not bar recovery for such defaults, from the guarantor.⁹² Thus, where A made and delivered to B a writing guaranteeing the prompt payment of all debts which C might make by the purchase of goods from B in the future, with interest thereof, B not being obliged to sell or C to purchase any goods, the undertaking of A will not be an absolute guaranty, but a collateral or conditional one, and reasonable notice must be given to A of the failure of C to pay for goods bought by him, unless such notice would be of no benefit to A.⁹³

§ 353. NOTICE OF DEFAULT.—Notice of default when necessary must be given within a reasonable time.⁹⁴ What is a reasonable time for such notice depends upon circumstances. If it be given before loss can occur, or the situation of the parties becomes changed so as to endanger loss, it is sufficient; if delayed so long as to deprive the guarantor of the means of securing himself, it will not be in time, and the guarantor will be released.⁹⁵

But if the principal is insolvent when the debt becomes due or default is made, no notice is required, because the guarantor could derive no benefit from the receipt of notice.⁹⁶

Of course, where the contract is an absolute guaranty, and

⁹² *Taussig v. Reid*, 145 Ill. 488; *Montgomery v. Kellog*, 43 Miss. 486; *Howe v. Nickels*, 22 Me. 175; *Clark v. Remington*, 11 Met. 361; *Davis v. Wells*, 104 U. S. 159; *Ferst v. Blackwell*, 39 Fla. 621; *Crittenden v. Fiske*, 46 Mich. 70; *Martin v. Wright*, 6 Adol. & E. 917.

⁹³ *Taussig v. Reid*, 145 Ill. 488.

⁹⁴ *Oxford Bank v. Haynes*, 8 Pick. 423; *Sylvester v. Downing*, 18 Vt. 31; *Furst v. Black*, 111 Ind. 308; *Brackett v. Rich*, 23 Minn. 485; *Patterson v. Reed*, 7 Watts & S. 144; *Greene v. Dodge*, 2 Ohio, 231.

⁹⁵ *Dickerson v. Derrickson*, 39 Ill. 574; *Taussig v. Reid*, 145 Ill. 488.

⁹⁶ *Brackett v. Rich*, 23 Minn. 485; *Dearborn v. Sawyer*, 59 N. H. 95; *Walker v. Forbes*, 25 Ala. 139; *Taussig v. Reid*, 145 Ill. 488.

provides that a definite sum shall be paid at a stated time, no notice of default is necessary before suit is brought against the guarantor.⁹⁷ Unlike a contract of an indorser, there is no condition as to demand and notice of default annexed to a contract of guaranty of payment or of performance.⁹⁸

§ 354. CONTINUING GUARANTY.—When the parties to a guaranty look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty; but when no time is fixed upon and nothing in the agreement indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time. Thus, a guaranty of payment for goods to be sold “from time to time” to an amount not exceeding a specified sum, is continuous until the sums remaining unpaid reach the designated limit, although the aggregate of purchases have exceeded it.⁹⁹ The rule is this: When by the terms of the undertaking, by the recitals in the instruments, or by a reference to a custom and course of dealing between the parties, it appears that the guaranty looks to future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, and the amount expressed is to limit the amount for which the guarantor is to be responsible.¹⁰⁰

§ 355. LETTERS OF CREDIT MAY BE A CONTINUING GUARANTY.—Letters of credit may be so expressed as to be a continu-

⁹⁷ *Gage v. Bank*, 79 Ill. 62; *Peck v. Frink*, 10 Iowa, 193; *Hubbard v. Haley*, 96 Wis. 578; *Barker v. Scudder*, 56 Mo. 272; *Powers v. Bumcratz*, 12 Ohio St. 273; *Lent v. Padelford*, 10 Mass. 230; *Gammell v. Parramore*, 58 Ga. 54.

⁹⁸ *Hubbard v. Haley*, 96 Wis. 578.

⁹⁹ *Crittenden v. Fiske*, 46 Mich. 70; *Sherman v. Mulloy* (Mass.), 54 N. E. Rep. 345; *Mason v. Pritchard*, 12 East, 227; *Douglass v. Reynolds*, 7 Pet. 113; *Hatch v. Hobbs*, 12 Gray, 447; *Gates v. McKee*, 13 N. Y. 232; *Melendy v. Capen*, 120 Mass. 222; *Taussig v. Reid*, 145 Ill. 488.

¹⁰⁰ *Anderson v. Blakeley*, 2 Watts & S. 237; *Hotchkiss v. Barnes*, 34 Conn. 27; *Congdon v. Read*, 7 R. I. 576; *Strong v. Lyon*, 63 N. Y. 172; *Boston, etc., Co. v. Moore*, 119 Mass. 435; *Reed v. Fish*, 59 Me. 358; *Boyce v. Ewart*, 1 Rice (S. Car.), 126.

ing guaranty. If the parties appear, by the letter of credit, to contemplate a course of future dealing between the parties, it is not exhausted by giving credit even to the amount limited by the letter which is subsequently reduced or satisfied by payment made by the debtor, but is to be deemed a continuing guaranty,¹⁰¹ and the writer of the letter of credit is liable for the credit given upon it without notice to him unless its terms express or imply the necessity of giving notice. Where there is a guaranty for future operations, and one of uncertain amount, there should be a distinct notice of acceptance. But where the guaranty is absolute in its terms, no notice is necessary.¹⁰²

Where a proposition is made by one party to guarantee payment to another, if he will sell goods to a third party, notice of acceptance of the proposition is necessary to create the contract of guaranty.¹⁰³

But another line of cases holds that notice must be given of acceptance of an absolute guaranty within a reasonable time to the guarantor.¹⁰⁴ But this doctrine is opposed to the weight of English and American authority.¹⁰⁵

§ 356. CONSTRUCTION OF CONTRACT.—The weight of authority is in favor of construing a contract of guaranty by rules which apply as favorably to the guarantor as those which apply

¹⁰¹ *Gates v. McKee*, 13 N. Y. 232.

¹⁰² *Union Bank v. Coster*, 3 N. Y. 204; *Yancey v. Brown*, 3 Sneed, 89; *Cormon v. Elledge*, 40 Iowa, 400; *Powers v. Bremeratz*, 12 Ohio St. 273, where the cases are reviewed; *Paige v. Parker*, 8 Gray, 211; *Maynard v. Morse*, 36 Vt. 617; *Douglass v. Howland*, 24 Wend. 35.

¹⁰³ *Neagle v. Sprague*, 63 Ill. App. 25; *Cooke v. Orne*, 37 Ill. 186; *Bishop v. Eaton*, 161 Mass. 496; *Wright v. Griffith*, 121 Ind. 478; *Lemp v. Arnegol*, 86 Tex. 690; *Smith v. Dann*, 6 Hill (N. Y.), 543; *Whitney v. Groat*, 24 Wend. 81.

¹⁰⁴ *Douglass v. Reynolds*, 7 Pet. 113; *Adams v. Jones*, 12 Pet. 207; *Lee v. Dick*, 10 Pet. 495; *Lawson v. Townes*, 2 Ala. 375; *Walker v. Forbes*, 25 Ala. 147; *McCollum v. Cushing*, 22 Ark. 542; *Croft v. Isham*, 13 Conn. 36; *Taylor v. McCluney*, 2 Houst. (Del.) 38; *Kinchelov v. Holmes*, 7 B. Mon. 9; *Bank v. Sloo*, 10 La. Ann. 543.

¹⁰⁵ *Powers v. Bumeratz*, 12 Ohio Stat. 273, where the English and American authorities are reviewed; *German Sav. Bank v. Roofing Co.* (Iowa), 51 Cent. L. Journal, 428, and note.

to other contracts, notwithstanding the guarantor is, in a sense, to be regarded as a surety.¹⁰⁶

Commercial guaranties are in extensive use, and should receive the liberal construction that is given to other contracts.¹⁰⁷ In such construction, technicalities should be excluded and the reasonable intention of the parties, as it may be gathered from all parts of the contract, should prevail.¹⁰⁸ The guarantor's liability must not be enlarged by implication, nor must he be held for purchases made by another for an indefinite time nor for an unlimited extent, unless the intent of the guarantor so to bind himself is clearly manifest.¹⁰⁹

A guaranty should be liberally construed according to the intention of the parties as manifested by the terms of the contract taken in connection with the subject matter, and in order to ascertain the intention of the parties the circumstances of the whole transaction must be considered.¹¹⁰ But the words of the contract cannot be enlarged beyond their natural import in favor of the guarantor, nor restricted in aid of the creditor. The circumstances accompanying the whole transaction may be looked to in ascertaining the intention of the parties.¹¹¹ A contract of surety must have such a construction given to it as will carry out the intention of the parties; a contract of guaranty is not to be interpreted by any different rule. So where a party guaranties that a minor will ratify a sale of land made to him when he arrives at majority, and also the notes given in payment for the land, a ratification of the sale and notes upon his becoming of age will release the guarantor, because it was not a per-

¹⁰⁶ *Taussig v. Reid*, 145 Ill. 488; *Lawrence v. McCalmont*, 2 How. 426; *Dobbins v. Bradley*, 17 Wend. 422; *Drummond v. Prestman*, 12 Wheat. 515.

¹⁰⁷ *Douglass v. Reynolds*, 7 Pet. 113; *Hargreaves v. Smee*, 6 Bing. 244; *Mayer v. Isaacs*, 6 Mees. & W. 605.

¹⁰⁸ *Rouss v. Cregler*, 103 Iowa, 60.

¹⁰⁹ *Dry Goods Co. v. Yearont*, 59 Kan. 684; *Jack v. Sinsheimer*, 125 Cal. 563; *Harvey v. Bank* (Neb.), 76 N. W. Rep. 870.

¹¹⁰ *Hooper v. Hooper*, 81 Md. 155.

¹¹¹ *Lee v. Dick*, 10 Pet. 482; *Mauran v. Bullus*, 16 Pet. 528; *Bell v. Bruen*, 1 How. 169; *Davis v. Wells*, 104 U. S. 159.

sonal guaranty of payment of the notes, but only that the minor would not repudiate the transaction at majority; for the only purpose of the execution of such contract was that the indebtedness should not be repudiated or payment refused on account of the age of the maker of the notes, as manifested by the intention of the parties and the circumstances surrounding the whole transaction.¹¹² But the authorities are in conflict. In some cases a strict interpretation, it is said, should be in favor of the guarantor.¹¹³ Other decisions hold that such contract should be construed like other contracts.¹¹⁴ Still others hold that the contract is not to be construed strongly in favor of or against the guarantor.¹¹⁵ And others hold that there should be a reasonable interpretation according to the intention of the parties.¹¹⁶

The construction of letters of credit should be reasonable and liberal, so as to render them safe to rely on.¹¹⁷ If the credit is limited, the party advancing on the faith of the letter is bound at his peril to ascertain whether the authority conferred has been exhausted.¹¹⁸ Thus, a guaranty for goods sold on six months' credit does not cover a four months' credit;¹¹⁹ the credit must be according to the terms of the letter.¹²⁰

§ 357. NEGOTIABILITY OF A GUARANTY.—A general guaranty

¹¹² *Storr v. Milliken*, 180 Ill. 458.

¹¹³ *Drummond v. Prestman*, 12 Wheat. 515; *Bright v. McKnight*, 1 Sneed, 164.

¹¹⁴ *Wills v. Ross*, 77 Ind. 1; *Smith v. Molleson*, 148 N. Y. 246; *London, etc., Bank v. Parrott*, 125 Cal. 472.

¹¹⁵ *White v. Reed*, 15 Conn. 457; *Mussey v. Raynor*, 22 Pick. 228; *Crist v. Burlingham*, 62 Barb. 351.

¹¹⁶ *Peoria Sav., etc., Co. v. Elder*, 165 Ill. 55; *Davis v. Wells*, 104 U. S. 159; *Shickle, etc., Iron Co. v. Water Works Co.*, 83 Iowa, 396; *Mathews v. Phelps*, 61 Mich. 327; *Shine v. Bank*, 70 Mo. 524; *Tootle v. Elgutter*, 14 Neb. 160; *Bennett v. Draper*, 139 N. Y. 272; *Birdsall v. Heacock*, 32 Ohio St. 177; *Wiler v. Henarie*, 15 Oreg. 28; *Gardner v. Watson*, 76 Tex. 25.

¹¹⁷ *Lawrence v. McCalmont*, 2 How. 426; *Belloni v. Freeborn*, 63 N. Y. 383.

¹¹⁸ *Ranger v. Sargeant*, 36 Tex. 26. Compare *Russell v. Wiggin*, 2 Story, 213.

¹¹⁹ *Leeds v. Dunn*, 10 N. Y. 475.

¹²⁰ *Dodge v. Myer*, 1 Cal. 405.

is assignable with the obligation secured thereby, and it goes with the principal obligation, and is enforceable by the same persons who can enforce the obligation.¹²¹ The rule is, as to general guaranty, that the transfer of a note carries with it all security, even if there is no formal assignment or delivery, or mention of the guaranty.¹²²

This rule is so because a general guaranty is one open for acceptance by the whole world. But a special guaranty is different; it is limited to a person to whom it is addressed, and usually contemplates a trust or repose of confidence in such person, and may not be assignable until a right of action has arisen thereon.¹²³ But when one purchases a note which is secured by a general guaranty, he is entitled to the benefit of such guaranty, though he buys in ignorance thereof.¹²⁴

But there is conflict among the authorities on the negotiability of a guaranty. It is held that a guaranty of a note or bill contained in a separate instrument is not negotiable merely because the paper guaranteed has that quality. So a guaranty may be assigned with the note and the holder will thereby be invested with the equitable title thereof as between the parties.¹²⁵ In a number of cases it is held that a guaranty indorsed on a note passes with the note in the hands of a *bona fide* holder.¹²⁶ Other cases hold that a guaranty cannot be transferred to a third person so as to authorize him to proceed in his own name on

¹²¹ *Clafin v. Ostrom*, 54 N. Y. 581; *Everson v. Gere*, 122 N. Y. 290; *Lane v. Duchac*, 73 Wis. 655; *Tidionte Sav. Bank v. Libbey*, 101 Wis. 193.

¹²² *Carpenter v. Longan*, 16 Wall. 271; *Croft v. Bunster*, 9 Wis. 503; *Commercial Bank v. Provident Institution*, 59 Kan. 361; *Ellsworth v. Harmon*, 101 Ill. 274; *Reed v. Garvin*, 12 Serg. & R. 100; *Harbord v. Cooper*, 43 Minn. 466; *Stillwell v. Northrup*, 109 N. Y. 473; *Jones v. Berryhill*, 25 Iowa, 289.

¹²³ *Jex v. Straus*, 122 N. Y. 293, distinguishing *Evansville Nat. Bank v. Kauffmann*, 93 N. Y. 273.

¹²⁴ *Tidionte Sav. Bank v. Libbey*, 101 Wis. 193.

¹²⁵ *Arents v. Commonwealth*, 18 Gratt. 770; *McLaren v. Watson*, 26 Wend. 425.

¹²⁶ *Webster v. Cobb*, 17 Ill. 466; *Commercial Bank v. Provident Inst.*, 59 Kan. 361; *State Nat. Bank v. Haylen*, 14 Neb. 480.

the guaranty against the guarantor,¹²⁷ and this applies whether indorsed on the note by the payee,¹²⁸ or by a third party.¹²⁹ Another class of cases holds that the transferee may sue in his own name, but takes the instrument with all the equities while in the hands of the assignor.¹³⁰

A letter of credit addressed to a particular person is not assignable.¹³¹ When bonds are made payable to bearer, if the guaranty is indorsed thereon, it passes with the bond.¹³² Some authorities hold that the assignee of the bond must bring suit in the name of the assignor for his use.¹³³

Generally the guaranty of a mortgage passes with it.¹³⁴

§ 358. NEGOTIABILITY OF GUARANTY UNDER SEAL.—No one but the party to whom the guaranty under seal is given can sue on it, although given for the benefit of others.¹³⁵ This is the general rule, but there are a few cases that hold that the party for whose use the contract is made, which is evidenced by the contract itself, may sue in his own name, and that such guaranty under seal is negotiable.¹³⁶ Thus, in Illinois, a third party for

¹²⁷ *Tuttle v. Binney*, 12 Met. 452; *Tinker v. McCauley*, 3 Mich. 188; *Miller v. Gaston*, 2 Hill (N. Y.), 192; *McDoal v. Yeomans*, 8 Watts, 361; *Ten Eyck v. Brown*, 3 Pin. (Wis.) 452; *Edgerly v. Lawson* (Mass.), 57 N. E. Rep. 1020.

¹²⁸ *Tuttle v. Bartholomew*, 12 Met. 452; *McDoal v. Yeomans*, 8 Watts, 361.

¹²⁹ *True v. Fuller*, 21 Pick. 140.

¹³⁰ *Central Trust Co. v. Bank*, 101 U. S. 68; *Dubuque First Nat. Bank v. Carpenter*, 41 Iowa, 518; *Phelps v. Church*, 65 Mich. 231; *Phelps v. Sargent*, 69 Minn. 118; *Everson v. Gere*, 122 N. Y. 290.

¹³¹ *Robbins v. Bingham*, 4 Johns. 476.

¹³² *Louisville Trust Co. v. Railroad Co.*, 75 Fed. Rep. 433; *Lemmon v. Strong*, 59 Conn. 448; *Craig v. Parks*, 40 N. Y. 181; *Wooley v. Moore*, 61 N. J. L. 16.

¹³³ *Ashland Bank v. Jones*, 16 Ohio St. 145; *Smith v. Dickinson*, 6 Humph. 261; *Reed v. Garvin*, 12 S. & R. 100.

¹³⁴ *Stillman v. Northrup*, 109 N. Y. 473. See, also, *Tucker v. Blandin*, 48 Hun, 439; 125 N. Y. 69. Compare *Briggs v. Latham*, 36 Kan. 206.

¹³⁵ *Farmington v. Hobert*, 74 Me. 416; *Huntington v. Knox*, 7 Cush. 374; *Henricus v. Englert*, 137 N. Y. 488; *Loeb v. Barris*, 50 N. J. L. 382; *De Bolle v. Ins. Co.*, 4 Whart. 68; *Flynn v. Ins. Co.*, 115 Mass. 449; *Woonsocket Rubber Co. v. Banigan* (R. I.), 42 At. Rep. 512.

¹³⁶ *Coster v. Mayor*, 43 N. Y. 399; *Houghten v. Milburn*, 54 Wis. 554; *Rogers v. Gosnell*, 51 Mo. 466; *Huckabee v. May*, 14 Ala. 263.

whose benefit a contract is made may bring *assumpsit* in his own name, on the contract, whether the contract is simple or under seal.¹³⁷

§ 359. GUARANTY OF COLLECTION.—A guaranty of a collection of a note or debt is different from a guaranty of payment. On the subject of guaranty of payment, the rule is not uniform. One line of decisions hold that a guaranty of the collection of a note, that it is not necessary for the holder to try collection by legal proceedings, provided it would be of no avail.¹³⁸ The guaranty is that the guarantor will pay if the holder uses due diligence and fails to collect. He must employ the usual means to collect of the maker, unless such means would be unavailing on the account of the insolvency of the maker.¹³⁹ So if a suit would be unavailing, and this can be shown, then the guarantor becomes liable without suit brought against the principal.¹⁴⁰

In other jurisdictions the grantor becomes liable only after the note has been sued upon and by due diligence it could not be collected.¹⁴¹

The rule is that the guarantor agrees to pay the debt in case it cannot be collected out of the principal debtor by the exercise of due or reasonable diligence. This diligence is held to be a suit against the principal debtor, a judgment, issuing of execution and its return unsatisfied. But the better doctrine is that

¹³⁷ Webster v. Fleming, 178 Ill. 140, affirming Dean v. Walker, 107 Ill. 540, and overruling Harms v. McCormick, 132 Ill. 104.

¹³⁸ McDoal v. Yeomans, 8 Watts, 361; McClurg v. Fryer, 15 Pa. St. 293; Sanford v. Allen, 1 Cush. 473; Middle States, etc., Co. v. Engle, 45 W. Va. 588; Wheeler v. Lewis, 11 Vt. 265; Central Investment Co. v. Miles, 56 Neb. 272; Dewey v. Investment Co., 48 Minn. 130; Beardsley v. Hawes, 71 Conn. 39.

¹³⁹ Dillman v. Nadelhoffer, 160 Ill. 121; Bester v. Walker, 4 Gil. (Ill.) 3.

¹⁴⁰ Thompson v. Armstrong, Breese (Ill.), 53; Stone v. Rockefeller, 29 Ohio St. 625; Camden v. Doremus, 3 How. 515.

¹⁴¹ Salt Springs Nat. Bank v. Pratt, 135 N. Y. 423; Moakley v. Riggs, 19 Johns. 69; Craig v. Parks, 40 N. Y. 181; Gettig v. Schautz, 101 Wis. 229; French v. Marsh, 29 Wis. 649; Voorhies v. Atlee, 29 Iowa, 49; Bosman v. Akeley, 39 Mich. 710. See, also, Ely v. Bibb, 4 J. J. Marsh. (Ky.) 71; Shepard v. Shears, 35 Tex. 763.

if it can be shown that the principal debtor is insolvent, no suit need be brought against him in order to make the guarantor liable.

But where a party holds a note secured by mortgage, sells the note and guarantees its collection, and at the same time assigns the mortgage, thereby furnishing the purchaser the means of obtaining payment of any part or the whole of the debt, it may well be claimed that the plain import of the guarantor's contract is that he will pay the debt, provided that by due diligence it cannot be collected out of the debtor or out of the mortgage, and that he will not be held liable until the mortgage security has been exhausted or resorted to without avail.¹⁴²

If a party guarantees the payment of a debt, it is absolute, and he becomes liable as soon as it becomes due and remains unpaid.¹⁴³ And a guarantor upon an original undertaking is liable with the principal debtor; his guaranty is absolute, and he becomes absolutely liable for breach of the principal contract.¹⁴⁴

Where the maker of a note becomes insolvent and a non-resident before maturity of the debt, the payee need not follow the maker, but may sue the guarantor on the note;¹⁴⁵ and the burden of proof is on the guarantor to show that the non-resident had property within the State where he formerly resided, sufficient to settle the debt or part of it.¹⁴⁶

§ 360. WHAT IS DUE DILIGENCE.—One class of cases holds that the guarantor agrees to pay the debt upon the condition that the guarantee should diligently prosecute the principal debtor without avail, using all ordinary legal means to that end, and exhaust any security that he may have, before proceeding

¹⁴² *Borman v. Carhartt*, 10 Mich. 338; *Borden v. Gilbert*, 13 Wis. 670; *Brainard v. Reynolds*, 36 Vt. 614; *Dewey v. Investment Co.*, 48 Minn. 130. Compare *Jones v. Ashford*, 79 N. Car. 172.

¹⁴³ *Leonhardt v. Bank*, 56 Neb. 38.

¹⁴⁴ *Bagley v. Cohen*, 121 Cal. 604.

¹⁴⁵ *Fall v. Youmans*, 67 Minn. 83.

¹⁴⁶ *Fall v. Youmans*, 67 Minn. 83.

against the guarantor by suit; that due diligence, in the absence of any special facts, requires the institution of a suit at the first regular term after maturity of the obligation, and obtaining of judgment and execution thereon as soon as practicable by the ordinary rules and practices of courts.¹⁴⁷ And this condition is not satisfied or done away with by proof that the principal was insolvent and that an action against him might have been fruitless.¹⁴⁸ However, a mere delay to prosecute the principal for a short time is not sufficient to negative the use of due diligence; but such delay may be continued so long as to release the guarantor as a matter of law.¹⁴⁹ Thus, a delay of four months to begin suit does not show diligence.¹⁵⁰ And a failure to sue promptly for each installment of interest when due, will operate to discharge the guarantor as to such interest.¹⁵¹

When the legal holder relies on diligence by action, he must institute suit against the debtor at the first term of the proper court after action has accrued, and must prosecute such proceedings to judgment and execution at the earliest period within his power, and if any delay is had in obtaining judgment, such result must not grow out of his consent or his knowledge. In those States where the obligee is not required to bring suit on account of the insolvency of the debtor, it is a condition precedent to the recovery against the guarantor, that the obligee shows such insolvency.¹⁵²

§ 361. DISCHARGE OF GUARANTOR.—The general rule is if the creditor does an act which injures the guarantor or his rights, or fails to do an act which his duty enjoins upon him,

¹⁴⁷ *Voorhies v. Atlee*, 29 Iowa, 49; *Salt Springs Nat. Bank v. Pratt*, 135 N. Y. 423; *Getty v. Schautz*, 101 Wis. 229.

¹⁴⁸ *French v. Marsh*, 29 Wis. 649; *Getty v. Schautz*, 101 Wis. 229; *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371; *Northern Ins. Co. v. Wright*, 76 N. Y. 445.

¹⁴⁹ *Day v. Elmore*, 4 Wis. 190; *McFarlane v. Milwaukee*, 51 Wis. 691; *Sherman v. Pedick*, 35 App. Div. 15.

¹⁵⁰ *Salt Springs Nat. Bank v. Pratt*, 135 N. Y. 423.

¹⁵¹ *Sherman v. Pedrick*, 35 App. Div. 15.

¹⁵² *Dillman v. Nadelhoffer*, 160 Ill. 121.

and such omission injures the guarantor, he is discharged; and he is released from liability whenever the terms of the contract have been materially altered, for a guarantor, like a surety, may stand upon the very terms of his undertaking.¹⁵³ The change of time of performance of the contract without his consent will discharge him.¹⁵⁴ So where bonds are guarantied to be paid at a certain time, the guarantor is not liable until that time arrives, though the principal may be liable before.¹⁵⁵ And a dissolution of a firm to whom the guaranty is addressed, will work a revocation.¹⁵⁶ And whenever the debt is satisfied, either by payment in money or by property, the guarantor is discharged.¹⁵⁷

§ 362. DISCHARGE BY CHANGE IN THE PRINCIPAL CONTRACT.

—Any material alteration in the contract of guaranty discharges the guarantor.¹⁵⁸ And so a guarantor is entitled to the benefit of a security given by his principal, and if it is surrendered without his consent he is released.¹⁵⁹ But the change in the form of the debt does not injure the guarantor. Thus, the change of part of an account into notes does not affect the liability of the guarantor.¹⁶⁰ And so if the change is void for want of consideration, it does not affect the guarantor, and he is not discharged.¹⁶¹

If the guarantor's liability is increased by a subsequent agreement, he is discharged. Thus, where he guarantees the fidelity of an agent working as salesman in a limited territory, and

¹⁵³ *Holmes v. Williams*, 177 Ill. 386; *Black's Appeal*, 83 Mich. 513; *Boalt v. Brown*, 13 Ohio St. 364; *Cambria Iron Works v. Keynes*, 56 Ohio St. 501.

¹⁵⁴ *King v. Newman*, 54 Ohio St. 273.

¹⁵⁵ *Union Trust Co. v. Motor Co. (Mich.)*, 76 N. W. Rep. 212.

¹⁵⁶ *Schoonover v. Osborne (Iowa)*, 79 N. W. Rep. 263.

¹⁵⁷ *Rudolph v. Hewitt*, 11 S. Dak. 646.

¹⁵⁸ *Pahlman v. Taylor*, 75 Ill. 629; *Marsh v. Griffin*, 42 Iowa, 403; *Fulman v. Seitz*, 68 Pa. St. 237; *State v. Pepper*, 31 Ind. 76; *Boalt v. Brown*, 13 Ohio St. 364; *Tolman v. Griffins*, 111 Mich. 301.

¹⁵⁹ *Foerderer v. Moors*, 91 Fed. Rep. 476.

¹⁶⁰ *Lennox v. Murphy*, 171 Mass. 370; *Norton v. Eastman*, 4 Me. 521.

¹⁶¹ *Staughter v. Moore*, 17 Tex. Civ. App. 233.

without his consent the territory is increased, he is discharged, and he is not liable for defaults of the agent after such increase.¹⁶²

But a guarantor is not released by a collateral agreement to the original contract by his principal, which alters no provision of the original contract or any obligation growing out of it;¹⁶³ nor by an additional contract;¹⁶⁴ nor because the obligee takes additional security from the principal.¹⁶⁵ Changing the contract so as to include interest will release the guarantor,¹⁶⁶ or a change in the form of the obligation,¹⁶⁷ or giving credit in cases of the guaranty,¹⁶⁸ or change in building contract,¹⁶⁹ or by the delivery of goods instead of money,¹⁷⁰ or by the misapplication of the guaranty to a pre-existing debt,¹⁷¹ or by giving another note in the place of the one guaranteed,¹⁷² or by accepting notes other than those guaranteed.¹⁷³ If the same kinds of goods with same price are accepted, the guarantor is not released.¹⁷⁴

§ 363. DISCHARGE BY EXTENSION OF TIME.—In order that a guarantor may be discharged by the extension of time, there must be a binding agreement between the creditor and the principal entered into without the consent of the guarantor, founded upon a valuable consideration, for the extension of the time for a definite period.¹⁷⁵ A mere delay of the creditor, when he is not bound to act with promptness, in enforcing payment will not

¹⁶² *Plunkett v. Machine Co.*, 84 Md. 529.

¹⁶³ *Morrill v. Boggott*, 157 Ill. 240.

¹⁶⁴ *Roberts v. Sully*, 2 App. Div. 152.

¹⁶⁵ *Trustees v. Gilliford*, 139 Ind. 524.

¹⁶⁶ *Springer Litho. Co. v. Wavey*, 97 Cal. 30.

¹⁶⁷ *Buch v. De Rivera*, 53 Hun, 367; *Backhouse v. Hall*, 6 B. & S. 507.

¹⁶⁸ *Kimball v. Baker*, 62 Wis. 526. Compare *Fisk v. Stone*, 6 Dak. 35.

¹⁶⁹ *Judah v. Zimmerman*, 22 Ind. 388.

¹⁷⁰ *Wight v. Johnson*, 8 Wend. 512.

¹⁷¹ *Glyn v. Hertel*, 8 Taunt. 208.

¹⁷² *Weed v. Grant*, 30 Conn. 74.

¹⁷³ *Davis Sew. Mach. Co. v. McGinnis*, 45 Iowa, 538.

¹⁷⁴ *Quinn v. Moss*, 45 Neb. 614.

¹⁷⁵ *Dixon v. Spencer*, 59 Md. 246; *Dodson v. Henderson*, 113 Ill. 360.

discharge the guarantor.¹⁷⁶ If the guarantor agrees to the extension, he is held liable.¹⁷⁷ If the contract is valid, it is immaterial whether the guarantor is actually injured by the extension of the time of payment of the debt, for the benefit of the maker; the rule as to a guarantor is the same as that applicable to a surety.¹⁷⁸

A guarantor may be released by extension of time of payment or shortening of time.¹⁷⁹ The extension must be definite and separate from the principal contract,¹⁸⁰ and founded upon a sufficient consideration,¹⁸¹ and for a definite time.¹⁸²

§ 364. DISCHARGE BY RELEASE OR NEGLIGENT LOSS OF SECURITIES.—Where a guarantor is entitled to the benefit of security given by the principal debtor to the creditor, a release or negligent loss of such security by the creditor will discharge the guarantor *pro tanto*.¹⁸³ Because the creditor must first resort to the securities for payment by exercising due diligence,¹⁸⁴ in order that the guarantor can have the benefit of such collaterals.¹⁸⁵ But the assignee of such guarantied note is under no obligation to protect the guarantor, by resorting to the property pledged as security for the debt, which was never in the assignee's possession or control.¹⁸⁶ And if the assignee who has exhausted the mortgaged property when the debt is due by legal

¹⁷⁶ *Pittsburg, etc., R. R. Co. v. Shaeffer*, 59 Pa. St. 350; *English v. Landon*, 181 Ill. 614.

¹⁷⁷ *Harvey v. Bank*, 56 Neb. 320.

¹⁷⁸ *Chicago, etc., Bank v. Black*, 72 Ill. App. 147.

¹⁷⁹ *Walrath v. Thompson*, 6 Hill (N. Y.), 540; *Leeds v. Dunn*, 10 N. Y. 469.

¹⁸⁰ *Campbell v. Baker*, 46 Pa. St. 243.

¹⁸¹ *Robinson v. Dale*, 38 Wis. 330; *Tatum v. Morgan* (Ga.), 33 S. E. Rep. 940; *Hayes v. Wells*, 34 Md. 512.

¹⁸² *Jarvis v. Hyatt*, 43 Ind. 163. See sec. 42 *et seq.*, 113 *et seq.*

¹⁸³ *Foerderer v. Moors*, 91 Fed. Rep. 476; *Batchelder v. Jennings*, 83 Ill. App. 569.

¹⁸⁴ *Middle States, etc., Co. v. Engle*, 45 W. Va. 588.

¹⁸⁵ *Holmes v. Williams*, 177 Ill. 386; *Fuller v. Tomlinson*, 58 Iowa, 111.

¹⁸⁶ *Blanding v. Wilson*, 107 Iowa, 46; *Fuller v. Tomlinson*, 58 Iowa, 111.

process and appropriates the amount received on the debt, he discharges his duty to the guarantor of the debt, whatever may have been received by the assignee.¹⁸⁷

Upon an absolute guaranty the creditor owes no duty to the guarantor except to act in good faith and not to be guilty of laches to his prejudice.¹⁸⁸ So an assignee and guarantor of a note and mortgage cannot be discharged from liability by the release of the mortgage by mistake, where the release has been corrected, and the mortgage is still a valid lien on the property as against the mortgagor.¹⁸⁹

§ 365. BY FRAUD AND DURESS.—The guarantor may be discharged by fraud and duress on the part of the guarantee at the inception of the contract. But where the guarantor knows that the undertaking of his principal is liable to be defeated, he must be considered as entering into it with reference to such contingency and, of course, will be held on his guaranty.¹⁹⁰ But unless fraud is clearly shown, the guarantor is not affected by the invalidity of the original obligation.¹⁹¹

Where a party assigns an instrument and guaranties it, he cannot show that the instrument is invalid.¹⁹²

If the guarantor is induced by fraud to guaranty the contract by the other parties, he is not liable;¹⁹³ but if the guarantee is an innocent party, the fraud of the principal will not avoid the guaranty.¹⁹⁴

¹⁸⁷ *Holmes v. Williams*, 177 Ill. 386.

¹⁸⁸ *Hubbard v. Haley*, 96 Wis. 578.

¹⁸⁹ *Kane v. Williams*, 99 Wis. 65.

¹⁹⁰ *Sterns v. Marks*, 35 Barb. 565.

¹⁹¹ *Purdy v. Peters*, 35 Barb. 239.

¹⁹² *Remsen v. Graves*, 41 N. Y. 475; *Zabriskie v. Railroad Co.*, 23 How. 399; *Erwin v. Downs*, 15 N. Y. 576.

¹⁹³ *Morrison v. Schlesinger*, 10 Ind. App. 665; *Jungk v. Reed*, 9 Utah, 49; *New Home Sew. Mach. Co. v. Simon* (Wis.), 80 N. W. Rep. 71; *Rathbone v. Frost*, 9 Wash. 162.

¹⁹⁴ *Anderson v. Warne*, 71 Ill. 20; *Powers v. Clarke*, 127 N. Y. 417.

§ 366. GUARANTY COVERS DEFECTS IN THE ORIGINAL CONTRACT—FAILURE OF CONSIDERATION.—A guaranty of a defective contract is valid. Thus, where the debt is justly owing, the guarantor is liable, though some defect or incapacity of the principal the debt could not be enforced against the latter.¹⁹⁵ So a guaranty of a lease is valid, though only one of two lessees executed the lease.¹⁹⁶ So the guarantor of a note purporting to be made by two, where the signature of one is unauthorized, is liable.¹⁹⁷ If the contract becomes invalid for want of consideration, then the guarantor is released.¹⁹⁸

§ 367. REVOCATION OF A CONTINUING GUARANTY.—Unless the terms of a continuing guaranty forbid, it may be revoked on notice.¹⁹⁹ Such guaranty is revocable at the pleasure of the guarantor unless made to cover some specific transaction which is not exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce.²⁰⁰ And the fact that the instrument is under seal cannot change this rule.²⁰¹

§ 368. DEATH OF GUARANTOR.—The effect of the death of the guarantor upon a continuing guaranty has been determined differently by different courts. In some jurisdictions the death is held to work a revocation of the guaranty. The guarantor's estate is held bound in contracts upon which the liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for liability which is created

¹⁹⁵ *Erwin v. Downs*, 15 N. Y. 576.

¹⁹⁶ *McLaughlin v. McGovern*, 34 Barb. 208.

¹⁹⁷ *Sterns v. Marks*, 35 Barb. 565.

¹⁹⁸ *Sawyer v. Chambers*, 43 Barb. 622; *Cooper v. Joel*, 1 DeG. F. & J. 240; *Harvey v. Laurie*, 13 Ill. App. 400; *Mowing, etc., Machine Co. v. Land*, 98 Ky. 576; *Carroll County Sav. Bank v. Strother*, 28 S. Car. 504.

¹⁹⁹ *Gay v. Ward*, 67 Conn. 147; *Coulthart v. Clementson*, 5 Q. B. D. 42; *Jordan v. Dobbins*, 122 Mass. 168; *Agawam Bank v. Strever*, 18 N. Y. 502.

²⁰⁰ *Allen v. Kenning*, 9 Bing. 618; *Offord v. Davies*, 12 C. B., N. S. 748.

²⁰¹ *Jordan v. Dobbins*, 122 Mass. 168; *Offord v. Davies*, 12 C. B., N. S. 748; *Burgess v. Eve*, L. R. 13 Eq. 450.

after his death by the exercise of a power or authority which he might at any time revoke.²⁰²

But in other jurisdictions death alone does not revoke a continuing guaranty, because it is not a mere mandate or authority invoked *ipso facto* by the death of the guarantor; notice must be given of it in order to revoke such guaranty.²⁰³ Giving notice of death brings that fact within the knowledge of the guarantee, and is therefore a proper and sufficient notice to revoke the guaranty,²⁰⁴ and if the executor is not empowered to continue the guaranty, the guaranty is withdrawn.²⁰⁵ But where the guarantor binds not only himself, but his representatives, and representatives include his executor, then notice only of the death of the guarantor is not sufficient, and the estate is liable for indebtedness incurred by the principal debtor after the guarantor's death, because the guarantee was entitled to rely on the express provisions of the contract with him, and can not be bound to take notice of the guarantor's death as notice from his executor to determine the liability; to absolve the estate from further liability, the executor should have also acted in his fiduciary capacity, and withdrew the continuing guaranty.²⁰⁶

§ 369. RELEASE OF CO-GUARANTOR.—A release of a joint co-guarantor without the consent of the other guarantors will release them. So where one of several joint obligors withdraws from the undertaking before the delivery of the instrument, and it is not known by the other joint obligors, and the guarantee knowingly accepts such contract, the other co-guarantors are

²⁰² Jordan v. Dobbins, 122 Mass. 168; Hyland v. Habich, 150 Mass. 112; National Eagle Bank v. Hunt, 16 R. I. 148; Aitkin v. Lang (Ky.), 51 S. W. Rep. 174.

²⁰³ Coulthart v. Clementson, 5 Q. B. D. 42; Gay v. Ward, 67 Conn. 147.

²⁰⁴ Gay v. Ward, 67 Conn. 147.

²⁰⁵ National Eagle Bank v. Hunt, 16 R. I. 148; Harriss v. Fawcett, L. R. 15 Eq. 311; Coulthart v. Clementson, 5 Q. B. D. 42.

²⁰⁶ In re Silvester (1895), 1 Ch. 573. This case criticises Coulthart v. Clementson, 5 Q. B. Div. 42, which holds that the guarantor's will should be constructive notice that the guaranty is revoked both as to the guarantor and his executor.

released.²⁰⁷ One reason why a release of one of several joint co-obligors discharges all, is that by such release the right of contribution is cut off.²⁰⁸

§ 370. WHAT LAW GOVERNS.—It is a general rule that the *lex loci contractus* determines the nature and legal quality of the act done, whether it constitutes a contract, the nature and validity, the obligation and legal effect of such contract, and furnishes the rule of construction and interpretation.²⁰⁹ So the law of the State where the contract is executed, when its performance is guaranteed, and where the contract is to be performed, determines the validity of the guaranty, although suit is to be enforced in another State.²¹⁰ And so where a contract is executed in a State in which it is valid, and a person then agreeing to guarantee its performance, the guaranty is valid, though it is actually affixed in a State in which the contract is void.²¹¹ So a contract of guaranty executed in one State of the performance of a contract which is to be performed there, is governed by the laws of that State, though the guaranty is made elsewhere.²¹² Thus, the law of the place where a letter of credit is executed, and where the drafts made in pursuance thereof are payable, governs the obligation of those who sign the letter.²¹³

§ 371. STATUTE OF LIMITATIONS.—The statute of limitations begins to run in favor of the guarantor from the time he is liable to suit, and this may or may not be the same time the principal's debt becomes due.²¹⁴ At common law a payment made upon a note by the principal debtor before the completion of the bar of the statute served to keep the debt alive both as to himself and

²⁰⁷ Potter v. Gronbeck, 117 Ill. 404.

²⁰⁸ Clark v. Mallory, 83 Ill. App. 488; 185 Ill. 227.

²⁰⁹ Carnegie v. Morrison, 2 Met. 397.

²¹⁰ Russell v. Buck, 14 Vt. 147.

²¹¹ Richter v. Frank, 41 Fed. Rep. 859.

²¹² Cowles v. Townsend, 37 Ala. 77; Cross v. Petree, 10 B. Mon. 413.

²¹³ Bissell v. Lewis, 4 Mich. 450.

²¹⁴ Hooper v. Hooper, 81 Md. 155; Wofford v. Unger, 55 Tex. 480; State Bank v. Knotts, 10 Rich. L. (S. Car.) 543.

the surety or guarantor.²¹⁵ This is the rule in the United States where it has not been changed by the statute.²¹⁶ At common law and in those States where the common law prevails, a distinction is made between those cases in which a part payment is by one of several promisors of a note before the statute of limitations has attached, and those in which payment is made after the completion of the bar of the statute; it being held in the former that the debt is kept alive as to all, and in the latter that it is revived only to the party making the payment.²¹⁷ So under the common-law rule, part payment by one of several joint debtors of a debt barred by limitation, revives the debt as to him, and forms a new point from which the statute begins to run, but does not revive it as against the other joint debtors or guarantors.²¹⁸ The reason of this rule lies in the principle that by withdrawing from a joint debtor the protection of the statute, he is subject to a new liability not created by the original contract of indebtedness, and so cannot be held by the act of his co-debtor.

Where the guaranty is a continuing one, on which loans are made from time to time, the statute of limitations does not begin to run in favor of the guarantor until default of payment is made.²¹⁹ And it seems that where the guaranty is limited to a single transaction, the statute begins to run in favor of the guarantor from the time when the guaranty is executed.²²⁰

In case of a guaranty of a signature which is forged, such guaranty is broken when made, and the right of action accrues at once, and therefore the statute begins to run at the same time.²²¹

²¹⁵ *Whitcomb v. Whiting*, 2 Doug. 652; *Burleigh v. Stott*, 8 B. & C. 36; *Wyatt v. Hodson*, 8 Bing. 309; *Marnizinger v. Mohr*, 41 Mich. 685.

²¹⁶ *National Bank v. Cotton*, 53 Wis. 317; *Quimby v. Putnam*, 28 Me. 419.

²¹⁷ *Atkins v. Tredgold*, 2 B. & C. 23; *Sigourney v. Drury*, 14 Pick. 387; *Ellicott v. Nichols*, 7 Gill (Md.) 72; *Hooper v. Hooper*, 81 Md. 155; *Kimball v. Cummins*, 3 Met. (Ky.) 327; *Biscoe v. Jenkins*, 5 Eng. (Ark.) 108.

²¹⁸ *Border v. Peay*, 20 Ark. 293.

²¹⁹ *State Bank v. Knotts*, 10 Rich. L. (S. Car.) 543.

²²⁰ *Sollee v. Mengy*, Bailey L. (S. Car.) 620.

²²¹ *Lehigh Coal, etc., Co. v. Blakelee*, 7 Pa. Dist. 32.

A guaranty of a barred debt is enforceable.²²² After the principal contract has been barred, no acknowledgment of it by the principal can take it out of the statute of limitations as to the guarantor. The acts of the principal in such case has no more effect on the guarantor than the acts of a stranger.²²³

§ 372. PAYMENT OF DEBT BY GUARANTOR.—If the guarantor has to pay the debt when due he has an immediate right of action against the principal.²²⁴ And after he has paid the debt, payment by the principal to another co-guarantor will not release the principal from his obligation to pay the guarantor making the payment.²²⁵ And if the guarantor has paid a debt guaranteed verbally, he can recover against the principal, and the statute of frauds will be no defense to such action, although it would be a defense to an action brought on the guaranty;²²⁶ the statute can have no operation as between the original debtor and his guarantor.²²⁷

²²² *Miles v. Linnell*, 97 Mass. 298; *Flack v. Neill*, 22 Tex. 253; *Shadburne v. Daly*, 76 Cal. 355.

²²³ *Meade v. McDowell*, 5 Bing. (Pa.) 195.

²²⁴ *Cotton v. Alexander*, 32 Kan. 339; *Kimmel v. Lowe*, 28 Minn. 265.

²²⁵ *Lowry v. Bank*, 2 Watts & S. 210. See, also, *Slaughter v. Moore*, 17 Tex. Civ. App. 233.

²²⁶ *Beal v. Brown*, 13 Allen, 114; *Cahill v. Bigelow*, 18 Pick. 369, 372; *Lee v. Stowe*, 57 Tex. 444.

²²⁷ *Godden v. Pierson*, 42 Ala. 370; *Ames v. Jackson*, 115 Mass. 512; *Lee v. Stowe*, 57 Tex. 444; *Cahill v. Bigelow*, 18 Pick. 369.

CHAPTER XIV.

GUARANTY WITHIN THE STATUTE OF FRAUDS.

§ 373. FOURTH SECTION OF THE STATUTE OF FRAUDS.—The fourth section of the statute of frauds provides that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.¹ This statute, with few modifications, has been re-enacted throughout the United States.

§ 374. WHEN THE PROMISE IS WITHIN THE STATUTE.—When the contract is merely one of guaranty, that is, when it does not impose any direct liability, and consists solely in an engagement for performance by the principal, it is manifestly within the terms of the statute, and the contract must be in writing. And there must be a principal debtor, and the promise must be made to the creditor to whom the principal debtor has already or is thereafter to become liable. The express promise must create a liability to pay for another; that is, the promisor must agree to pay if the debtor does not, and the promise must be in writing.²

In some jurisdictions, it is held to be a presumption of law that if any contract, beneficial to the promisor, is the object sought to be obtained by his promise, he must be understood to intend an original undertaking which is not within the statute.³

¹ 29 Car. 2, ch. 3.

² *Elder v. Warfield*, 7 H. & J. (Md.) 391; *Birkmyr v. Darnell*, Salk. 27; *Spear v. Bank*, 156 Ill. 555.

³ *Westmoreland v. Porter*, 75 Ala. 452; *Chapline v. Atkinson*, 45 Ark. 67; *Lerch v. Gallup*, 67 Cal. 595.

As a general rule, in order that the promise can be held to be within the statute, it is essential that there be a binding and subsisting obligation or liability to the promisee, to which the promise is collateral; that is, the party for whom the promise has been made must be liable to the party to whom it is made.⁴

§ 375. EFFECT OF THE STATUTE OF FRAUDS.—In some States extension of time to pay the debt to a certain day, by paying interest, is no consideration; but where this is a consideration the contract must be in writing. Thus, a parol agreement by the debtor to pay interest for a year at a certain rate is not a sufficient consideration,⁵ and if it would be a sufficient consideration the contract must be in writing.⁶ Under the statute of Illinois it is not necessary to the existence of a valid contract to extend the time of payment of a promissory note that such extension must be in writing. Because the extension of time does not abrogate the original contract so as to make an entire new contract resting in parol, but is only the effect of extending the time of payment fixed in the note to a day certain in the future for its performance. The new agreement is one to postpone the performance agreed upon for a definite time for a full consideration.⁷

§ 376. PRINCIPAL DEBTOR—INCAPACITY TO CONTRACT.—Where one becomes surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. For incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense of the

⁴ *Hargreaves v. Parsons*, 13 Mees. & W. 561; *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Westfall v. Parsons*, 16 Barb. 645; *Preble v. Baldwin*, 6 Cush. 549; *Pratt v. Humphrey*, 22 Conn. 317; *Alger v. Scoville*, 1 Gray, 391; *Tighe v. Morrison*, 116 N. Y. 263; *Reesiter v. Waterman*, 151 Ill. 169.

⁵ *Turner v. Williams*, 73 Me. 466.

⁶ *Berry v. Pullen*, 69 Me. 101.

⁷ *Reynolds v. Barnard*, 36 Ill. App. 218.

principal for which the surety assures the promisee, and the surety is therefore liable.⁸

Where there is no fraud, duress, deceit or violation of law or public policy on the part of the payee in procuring the execution of the promise, the surety in such case is liable, although the principal be not.⁹

Thus, a minor's contract is not void, but voidable at his election; and until it is avoided it is a valid contract. Nor can a third person avail himself of the minority of a debtor to obtain any right or security or title. Infancy is a personal privilege, of which no one can take advantage except the minor.¹⁰ So, it is said, a promise by a party to pay the debt of an infant, though made upon a sufficient consideration, is a promise to pay the debt of another, and must be in writing to be enforceable; the doctrine that there was no debt because the principal debtor was a minor cannot prevail.¹¹

Some courts, however, hold that in case of a guaranty of a person's contract who is incapacitated to contract, the guarantor is not liable. As soon as the incompetent principal sets up his inability to make the contract, the debt cannot then be collected either from him or his guarantor; that the third party guarantied something that did not exist, and hence he is not liable.¹²

Whether this doctrine is correct admits of doubt. The undertaking of a surety is immediate and direct that the act shall be done; if not done, the surety becomes at once responsible, and the creditor may sue him alone or him and the debtor together. In case of guaranty the guarantor undertakes to pay if the principal cannot; that is, he is liable only for the ability of the debtor to perform this act. In the case of guaranty, non-liabil-

⁸ *Winn v. Sanford*, 145 Mass. 302.

⁹ *Davies v. Statts*, 43 Ind. 103; *St. Albans Bank v. Dillon*, 30 Vt. 122; *Kimball v. Newall*, 7 Hill, 116; *Jones v. Crosthwait*, 17 Iowa, 393; *Weed Sewing Mach. Co. v. Maxwell*, 63 Mo. 486.

¹⁰ *Kendall v. Lawrence*, 22 Pick. 540.

¹¹ *Dexter v. Blanchard*, 11 Met. 365; *Davis v. Statts*, 43 Ind. 103.

¹² *King v. Summit*, 73 Ind. 312; *Smith v. Hyde*, 19 Vt. 54. See sec. 380.

ity of the debtor must first be shown before the guarantor becomes liable.¹³

§ 377. NEW CONSIDERATION.—The general rule is that where there is in existence an obligation on the part of another and a promise to perform that obligation if he does not, or to guaranty his performance, it is not within the statute if it is made upon a new consideration inuring to the benefit of the promisor, although the former obligation is not extinguished, provided the chief purpose of the promisor is to obtain a benefit to himself.¹⁴

In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following rules may be applied: (1) If the promisor is a stranger to the transaction, without interest in it, the obligations of the statute are to be strictly upheld as a collateral undertaking; (2) but if he has a personal, immediate and pecuniary interest in the transaction in which a third party is the original obligor, it is founded upon a sufficient consideration, and is valid as an original contract. The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understood it to be a collateral or direct promise.¹⁵

§ 378. CONSIDERATION FOR PROMISE.—A contract, whether required to be in writing, to be valid, must be based upon a sufficient consideration. So where a creditor accepts from a third person in payment and satisfaction of his debt, the obligation of such third person, it is a new undertaking, and not within the

¹³ *Reigart v. White*, 52 Pa. St. 440.

¹⁴ *Borchsenius v. Canuston*, 100 Ill. 82; *Clifford v. Luhring*, 69 Ill. 401; *Power v. Rankin*, 114 Ill. 52; *Westmoreland v. Porter*, 75 Ala. 452; *Williamson v. Hill*, 3 Mackay (D. C.), 100; *Fears v. Story*, 131 Mass. 47; *Fitzgerald v. Morrissey*, 14 Neb. 198; *Merriam v. McManus*, 102 Pa. St. 102; *Whitehurst v. Hyman*, 90 N. Car. 487; *Lookout Mountain R. R. Co. v. Houston*, 85 Tenn. 224; *Spann v. Cochran*, 63 Tex. 240; *Voris v. Loan Asso.*, 20 Ind. App. 630; *Stebbins v. Scott*, 172 Mass. 355; *Bluthenthal v. Moore*, 106 Ga. 424; *Craft v. Kendrick*, 39 Fla. 90.

¹⁵ *Davis v. Patrick*, 141 U. S. 479.

statute of frauds, but the contract must be supported by a sufficient consideration.¹⁶ There must be a sufficient consideration in every case, even if the contract is in writing. But a consideration is not of itself sufficient to supply the place of a writing where one is necessary. To take the case out of the statute, there must be a consideration moving from the promisor, either from the creditor or debtor; that is the feature which imparts to the promise the character of an original undertaking.¹⁷

§ 379. THIRD PARTY TAKING DEBTOR'S PROPERTY—AGREEMENT TO PAY CREDITOR.—A debtor may place his property in the hands of a third party for the purpose of having it converted into money to pay his debt. If the receiver takes the property for such purpose and promises the debtor to pay such debt, the promise need not be in writing.¹⁸ Thus, where lumber was sold to A on the credit of B, and A pays B therefor, a promise by B to the vendor to pay him for the lumber will be in the nature of an original contract to pay the debt of a third party, founded upon a sufficient consideration, and not within the statute.¹⁹ But the property must be placed in the hands of a third party unconditionally, and the third party must take it for that purpose. If the third party has the liberty to pay the debt out of his own property, and not out of the debtor's, then a promise to pay the creditor comes within the statute.²⁰ So where the assignee arranges to pay the assignor's debt after he has reduced or converted the property into cash, a verbal promise to the debtor's creditor before such conversion into money, to pay the debt is void, as it comes within the statute.²¹

Where the money is in the hands of the promisor no written contract is required. Thus, where a party agrees to pay board

¹⁶ Carlisle v. Campbell, 76 Ala. 247.

¹⁷ Mallory v. Gillett, 21 N. Y. 412.

¹⁸ Wait v. Wait, 28 Vt. 350; Dock v. Boyd, 93 Pa. St. 92.

¹⁹ Watkins v. Sands, 4 Ill. App. 207.

²⁰ Ackley v. Parmenter, 98 N. Y. 425; Shaaber v. Bushong, 105 Pa. St. 514.

²¹ Belknap v. Bender, 75 N. Y. 446.

for workmen, and has the money for that purpose, an oral contract is sufficient.²²

§ 380. IF THIRD PERSON IS NOT LIABLE.—Some courts hold that if the third person is not liable, then the undertaking is not within the statute. This doctrine is applied where the promise to answer for the debt, default or miscarriage of an infant or other parties incapacitated to make a valid contract; that is, there is no third person liable in contemplation of law, and the promise is not within the statute,²³ but is an original undertaking of the guarantor, and he is therefore liable as on any other debt he may contract.²⁴ If it is an *ultra vires* contract of a corporation, the rule is the same, and the guarantor alone is liable.²⁵

§ 381. ORIGINAL CONSIDERATION.—The statute by its terms operates on cases where there is a primary or original debt or obligation upon which is based a collateral promise of another person, to answer for such primary or original debt or obligation. If there be in fact no such primary debt or obligation, or the same is extinguished and discharged, or if the promise be not to answer for such primary debt or obligation, or if it be a primary or direct promise for a sufficient consideration, the statute does not apply or require a promise to be in writing. Because the statute contemplates the mere promise of one person to be responsible for another, and cannot be interposed as a cover and shield against the actual obligation of the defendant himself. If the third person makes an entire but substantial and independent contract with the creditor to perform, or some service, this may be enforced though not in writing, as it is not collateral.²⁶

²² Chicago, etc., Coal Co. v. Liddell, 69 Ill. 639.

²³ Harris v. Huntbach, 1 Bur. 373; Chapin v. Lapham, 20 Pick. 467; Anderson v. Spence, 72 Ind. 315. See sec. 376.

²⁴ Harris v. Huntbach, 1 Bur. 373.

²⁵ Drake v. Flewellen, 33 Ala. 106.

²⁶ Yeoman v. Mueller, 33 Mo. App. 343; Gale v. Harp, 64 Ark. 462; Crawford v. Edison, 45 Ohio St. 239; Clifford v. Luhring, 69 Ill. 401; Haga-

The object of a collateral promise is to promote the interest of another; the object of an original promise is to promote the interest of the party making the promise. The former is within the operation of the statute, the latter is not affected by it. When the promisor is himself to receive the benefit for which the promise is exchanged, it is not usually material whether the original debtor remains liable or not.²⁷

§ 382. ORAL PROMISE TO INDEMNIFY ANOTHER.—The general rule is that an oral promise by one person to indemnify another for becoming a guarantor for a third person is not within the statute, and need not be in writing, for the assumption of the responsibility is a sufficient consideration for the promise.²⁸ This is now the law in England.²⁹

Where the inducement for the promise of indemnity is a benefit to the promisor which he did not have before, or would not otherwise enjoy, as where he has a personal, immediate and pecuniary interest in the principal transaction, and is therefore himself a party to be benefited by performance on the part of the promisee, the contract is not within the statute, and may be supported by a verbal undertaking. In reality the undertaking is to pay a debt which is in substance a debt of the promisor.³⁰ A contract of indemnity is not a contract with the creditor to answer for the default or miscarriage of the debtor, but is independent of the principal contract or obligation, and constitutes

dorn v. Stronach, 81 Mich. 56; Fitzgerald v. Morrissey, 14 Neb. 198; Young v. French, 35 Wis. 111; Lemmon v. Box, 20 Tex. 329; Bayles v. Wallace, 56 Hun, 428; Jolly v. Walker, 26 Ala. 690; Kilbride v. Moss, 113 Cal. 432; Learn v. Upstill, 52 Neb. 271. Compare Ellison v. Jackson, 12 Cal. 542; Noyes v. Humphreys, 11 Gratt. 635; Ware v. Stephenson, 10 Leigh, 155; Puckett v. Bates, 4 Ala. 390.

²⁷ Calkins v. Chandler, 36 Mich. 324.

²⁸ Jones v. Bacon, 145 N. Y. 446; Chapin v. Merrill, 4 Wend. 657; Tighe v. Morrison, 116 N. Y. 263; Ross v. Wallenberg, 31 Oreg. 269.

²⁹ Thomas v. Cook, 8 Barn. & C. 728; Reader v. Kingham, 13 C. B., N. S. 344; Guild v. Conrad (1894), 2 Q. B. 885; Wildes v. Dudlow, 19 Eq. 198.

³⁰ Smith v. Delaney, 64 Conn. 264; Davis v. Patrick, 141 U. S. 479; Potter v. Brown, 35 Mich. 274; Emerson v. Slater, 22 How. 43.

an entirely distinct and separate undertaking with which the creditor has nothing to do. In such cases the assumption of liability by the promisor is itself a sufficient consideration to support the promise regardless of any subservient interest of the promisor, and the fact of his becoming co-surety with the promisee to it need not be in writing.³¹ Indemnity contracts are not within the statute, as they are not made to pay the debt of another;³² this is the great weight of authority and trend of all the late decisions which are not controlled by precedent.³³ This doctrine is based upon the ground that the contract of indemnity is not within the statute, as the statute concerns only contracts of suretyship; that the contract is an original one, and therefore not within the statute.

But another line of cases holds that an indemnity is within the statute of frauds, because wherever there is a liability in existence, the performance of which by the debtor will put an end to liability upon the special promise, the special promise amounts to a promise to pay the debt of another, and must be regarded as collateral to it.³⁴ This doctrine has been distinctly repudiated in England and by the majority of the courts in the United States. And the oral promise to identify a person for becoming surety on another's bail bond, according to the minor-

³¹ *Mills v. Brown*, 11 Iowa, 314; *Punn v. West*, 5 B. Mon. 376; *Holmes v. Knight*, 10 N. H. 175; *Vogel v. Melms*, 31 Wis. 306; *Boyer v. Soules*, 105 Mich. 31; *Minick v. Huff*, 41 Neb. 516.

³² *Barth v. Graf*, 101 Wis. 27; *Warren v. Abbott* (N. J.), 46 At. Rep. 575; *Fidelity, etc., Co. v. Lawlor*, 64 Minn. 144.

³³ *Ressiter v. Waterman*, 151 Ill. 169; *Braman v. Russe'l*, 20 Vt. 205; *Goetz v. Foos*, 14 Minn. 265; *Aldrich v. Ames*, 9 Gray, 76; *Smith v. Laywood*, 5 Me. 504; *Hoggart v. Thomas*, 35 La. Ann. 298; *Yorkshire, etc., Co. v. Maclure*, 19 Ch. Div. 478; *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498; *Guild v. Conrad* (1894), 2 Q. B. 885; *Jones v. Bacon*, 145 N. Y. 446; *Apgar v. Hiler*, 58 N. H. 523; *Anderson v. Spencer*, 72 Ind. 315; *Mills v. Brown*, 11 Iowa, 314.

³⁴ *May v. Williams*, 61 Miss. 125; *Bissig v. Britton*, 59 Mo. 204; *Hunt v. Ford*, 142 Mo. 283; *Ferrell v. Maxwell*, 28 Ohio St. 383; *Simpson v. Nance*, 1 Spears (S. Car.), 4; *Macy v. Childress*, 2 Tenn. Ch. 438; *Nugent v. Wolfe*, 111 Pa. St. 471; *Green v. Crosswell*, 10 Ad. & E. 453.

ity of the courts, is within the statute of frauds, and must be in writing.³⁵

§ 383. INDEMNITY CONTRACTS IN GENERAL.—So in some jurisdictions the promise, to come within the statute of frauds, must result in a contract of suretyship; because it is held that the obligation arising from the special promise should be purely a collateral one; therefore a contract of indemnity does not come within the statute of frauds, and need not be in writing.

But in other jurisdictions, a mere contract of indemnity is within the statute; because it is argued that wherever there is a liability in existence, the performance of which by the debtor will put an end to the liability upon the special promise, the specific promise amounts to a promise to pay the debt of another, and must be regarded as collateral to it. Therefore the statute of frauds applies to a contract of indemnity. Thus, if a person signs an obligation as surety upon the promise of indemnity by one not bound by the same instrument, the promise is within the statute, as being a promise to answer for the default of the principal upon his implied liability to his surety. A promise to indemnify one for becoming a surety of another must be in writing.³⁶ But an exception is generally recognized where the indemnitor is himself primarily liable for the debt guaranteed.³⁷

But other courts hold that a promise to indemnify one for becoming a surety for another need not be in writing, because it is an original undertaking.³⁸ The promise is held not to be within

³⁵ *May v. Williams*, 61 Miss. 125, where the authorities are reviewed. *Green v. Crosswell*, 10 Ad. & El. 453. Compare *Thomas v. Cook*, 8 Barn. & Cr. 728.

³⁶ *Brand v. Whelan*, 18 Ill. App. 186; *May v. Williams*, 61 Miss. 125; *Ferrel v. Maxwell*, 28 Ohio St. 383; *Bissig v. Britton*, 59 Mo. 204; *Nugent v. Wolfe*, 111 Pa. St. 471; *Green v. Crosswell*, 10 Ad. & E. 453. Compare *Ressiter v. Waterman*, 151 Ill. 169.

³⁷ *Brand v. Whelan*, 18 Ill. App. 186.

³⁸ *Mills v. Brown*, 11 Iowa, 314; *Anderson v. Spencer*, 72 Ind. 315; *Potter v. Brown*, 35 Mich. 274; *Goetz v. Foos*, 14 Minn. 265; *DeMerritt v. Bickford*, 53 N. H. 523; *Apgar v. Hiler*, 24 N. J. L. 812; *Sanders v. Gillespie*, 59 N. Y. 250; *Tighe v. Morrison*, 116 N. Y. 263; *Braman v.*

the statute, because it is not to be made to the creditor, but to one who is debtor.³⁹ Others hold the oral promise to be enforceable, because the implied obligation of the principal to indemnify his surety arises from a subsequent fact, that is, the payment of the debt by the surety.⁴⁰

§ 384. WHAT IS A SUFFICIENT CONSIDERATION.—The consideration to support the promise to pay the debt of another is the same as in other contracts, and when sufficient the statute of frauds does not apply, as it is a new consideration. There is a sufficient consideration to support an agreement to answer for the debt of another, when the creditor is induced by the promisor to relinquish a valid lien which he has upon property to secure a debt.⁴¹ A promise to pay the debt of another arising out of some new consideration or benefit to the promisor, or harm to the promisee moving to the promisor, either from the promisee or the original debtor, is not within the statute, although the original debt still subsists and remains unaffected by such agreement.⁴² It being the own debt of the promisor, he cannot therefore rely upon the statute of frauds as being a promise to pay the debt of another.⁴³

A mere verbal promise to be liable for costs in a suit is void

Russell, 20 Vt. 205; Vogel v. Melms, 31 Wis. 306; Wilde v. Dudlow, L. R. 19 Eq. Cas. 198; Cripps v. Hartnoll, 4 Best & S. 414; Jones v. Shorter, 1 Ga. 294; Aldrich v. Ames, 9 Gray, 76; Phelps v. Stone, 172 Mass. 355; Barth v. Graf, 101 Wis. 27; Townsend v. White, 102 Iowa, 47.

³⁹ Reader v. Kingman, 13 C. B., N. S. 344; Wilde v. Dudlow, 19 Eq. 198; Aldrich v. Ames, 9 Gray, 76; Anderson v. Spence, 72 Ind. 315.

⁴⁰ Dunn v. West, 5 B. Mon. (Ky.) 376; Lucas v. Chamberlain, 8 B. Mon. 276. See, also, Read v. Nash, 1 Wils. 305; DeWolf v. Rebaud, 1 Pet. (U. S.) 476; Emerson v. Slater, 22 How. (U. S.) 28.

⁴¹ Bluthenthal v. Moore, 106 Ga. 424.

⁴² Craft v. Kendrick, 39 Fla. 90; Wilson v. Bevans, 58 Ill. 232; Runde v. Runde, 59 Ill. 98; Hirsch v. Carpet Co., 82 Ill. App. 234; Putney v. Farnham, 27 Wis. 187; Mallory v. Gillett, 21 N. Y. 412; Mills v. Brown, 11 Iowa, 314; Adams v. Huggins, 78 Mo. App. 219; Besshears v. Rowe, 46 Mo. 501; Clymer v. De Young, 54 Pa. St. 118; Calkins v. Chandler, 36 Mich. 320.

⁴³ Stebbins v. Scott, 172 Mass. 355.

for want of a written contract.⁴⁴ But if the sureties execute the obligation for costs themselves, and the consideration was the institution of a suit, it will bind them.⁴⁵

§ 385. NOVATION.—In every novation there are four essentials: A previous valid contract or obligation, an agreement of all the parties, of whom there must be at least three, to the new contract, the extinguishment of the old debt, and a valid new one. Unless the old debt is extinguished the new agreement is without consideration. The creation of the new obligation and the extinguishment of the old take place at the same time, and the statute of frauds does not apply.⁴⁶ Where the original debtor is discharged and the promisor is substituted as the debtor, the statute has no application to such transaction.⁴⁷

To make the promise collateral and bring it within the statute, it must be a promise to answer to the promisee for the debt, default or miscarriage of a third person, who is liable to the promisee therefor and continues so liable.⁴⁸ The statute never applies to contracts of novation, which must always be proved.⁴⁹

§ 386. PROMISE TO PAY THE DEBT OF ANOTHER—STATUTE OF FRAUDS.—Collateral contracts to pay the debt of another must be in writing to be valid. Original and independent contracts need not be in writing, and a parol agreement then is sufficient. The settled rule is that where the agreement to pay the debt of another is original and independent, it is not within the statute of frauds, and of course need not be in writing; and the agreement may be regarded as original, although it directly in-

⁴⁴ Bullard v. Johns, 50 Ala. 382.

⁴⁵ McDonald v. Wood, 118 Ala. 589.

⁴⁶ Murcroe v. Lumber Co., 55 Mich. 622; Trudeau v. Poutre, 165 Mass. 81; Kelso v. Flaney, 104 Ind. 180; Martin v. Curtis (Mich.), 77 N. W. Rep. 690; Ryan v. Pistone, 89 Hun, 78; 157 N. Y. 705.

⁴⁷ Hyatt v. Bonham, 19 Ind. App. 256.

⁴⁸ Downey v. Hinchman, 25 Ind. 453; Board v. Cincinnati, etc., Co., 128 Ind. 240; Hargraves v. Parsons, 13 Mees. & W. 560; Hall v. Alfred (Ky.), 49 S. W. Rep. 444.

⁴⁹ Hamlin v. Drummond, 91 Me. 175.

volves the interest of or concerns a third party, or may relate to an act or the performance thereof, by one not a party to the contract.⁵⁰

In order that the promise shall be within the statute, it is essential that there be a binding and subsisting obligation or liability to the promisee to which the promise is collateral, that is, the party for whom the promise has been made must be liable to the party to whom it is made.⁵¹ And the liability of the person for whom the promise is made, to the promisee, must be one which is capable of enforcement. Unless it appears that some person other than the promisor has incurred an actual liability with respect to the subject-matter of the promise, the agreement is not within the statute, although the third person may be under an imperfect or merely moral obligation to respond.⁵²

If the agreement is an original and independent one, it is not within the statute; but if it be collateral to the agreement of any person to answer for the debt of that other person, it is within the statute.⁵³

§ 387. PROMISE TO THE DEBTOR TO PAY HIS DEBT.—Contracts between the debtor and another party to take the debt and pay it as a consideration of a new contract between them is not within the statute. Thus, where the promisor agrees to pay the debt of the debtor and takes property of the latter as a consideration, this is an original promise not within the statute.⁵⁴ So a promise to a chattel mortgagee by a purchaser of the mortgagor's property, to pay the debtor's obligation, is not within the

⁵⁰ *Eddy v. Roberts*, 17 Ill. 505; *Ressiter v. Waterman*, 151 Ill. 169.

⁵¹ *Alger v. Scoville*, 1 Gray, 391; *Tighe v. Morrison*, 116 N. Y. 263; *Perkins v. Littlefield*, 5 Allen, 370; *Pratt v. Humphrey*, 22 Conn. 817; *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Ressiter v. Waterman*, 151 Ill. 169.

⁵² *Downey v. Hinchman*, 25 Ind. 453; *Smith v. Mayo*, 1 Allen, 160; *Tighe v. Morrison*, 116 N. Y. 263; *Ressiter v. Waterman*, 151 Ill. 169.

⁵³ *Spear v. Bank*, 156 Ill. 555; *Perkins v. Littlefield*, 5 Allen, 370; *Hargreaves v. Parsons*, 13 Mees. & W. 561.

⁵⁴ *Don Yook v. Mill Co.*, 16 Wash. 450.

statute, as the property taken is a sufficient consideration.⁵⁵ So taking the assets of a partnership and agreeing to pay its debts is an original obligation, and the statute does not apply.⁵⁶ And the promise of the grantee of land to pay the incumbrance on the land sold, as part of the consideration, is not within the statute.⁵⁷ In all such transactions where the promisor receives a consideration, the transaction is not collateral, but original, and need not be reduced to writing.

§ 388. TO WHOM CREDIT IS GIVEN.—Whether a contract comes within the statute of frauds depends wholly on the agreement. If the party agrees to be originally bound, the contract need not be in writing; but if his agreement is collateral to that of the principal debtor, it is that of a surety to another, and the agreement must be in writing. It makes no difference in such cases whether the promise is made prior to the passing of the consideration or afterwards. If it is made before, and is a part of the original contract that security shall be given, then the original consideration for the contract will be sufficient to uphold the promise; but if the promise is made after the original contract has been fully executed, then the promise must be based upon a new consideration. In either case the contract must be in writing, and the latter must have a new consideration.⁵⁸

§ 389. INDORSING AND EXECUTING NOTES FOR ANOTHER.—An agreement to execute a note as surety for another is a promise to answer for his debt, and must, therefore, be in writing.⁵⁹ So an agreement by a third party to draw for a creditor a draft

⁵⁵ *Provonchee v. Piper* (N. H.), 36 Atl. Rep. 552.

⁵⁶ *Shufeldt v. Smith*, 139 Mo. 267.

⁵⁷ *Flint v. Land Co.*, 89 Me. 420.

⁵⁸ *Cahill v. Bigelow*, 18 Pick. 369; *Rogers v. Kneeland*, 13 Wend. 114; *Glenn v. Lehn*, 54 Mo. 45; *Moshier v. Kitchell*, 87 Ill. 18; *Lance v. Pearce*, 101 Ind. 595; *Langdon v. Richardson*, 58 Iowa, 610; *Champion v. Doty*, 31 Wis. 190; *Walker v. Hill*, 119 Mass. 249.

⁵⁹ *Dee v. Downs*, 57 Iowa, 539; *Wills v. Shinn*, 42 N. J. L. 138.

for his debtor for the amount of his own debt, is a promise to pay the debt of another, and must be in writing.⁶⁰

§ 390. ASSIGNMENT OF PROMISSORY NOTES.—The statute of frauds in relation to the liability of an assignor of a promissory note, is not applicable to cases where a guaranty accompanies the assignment.⁶¹ The assignor owes the assignee, and that particular mode of paying him is adopted. He guarantees, in substance, his own debt. Though the debt of a third person be incidentally guaranteed, it is not necessary that the contract shall be in writing.⁶² The case of a holder of a third person's note assigning it for value with a guaranty, is in effect the paying his own debt; though he incidentally guarantees the debt of a third person. It is not within the statute of frauds.⁶³

§ 391. AGREEING TO PAY DEBT OF CONTRACTOR.—In many instances a contractor fails to pay his workmen or for material for building, and the laborers and material men continue as before on the promise of the owner of the building that he will see that they are paid. The general rule in such cases is this: Where the leading object of the undertaking is to promote some objects of the party's own, his promise to pay is not within the statute, although its effect is to release or suspend the debt of another. Thus, where a party had employed a contractor to build a house, who fails on account of financial inability to pay his workmen and material men, and the person who is benefited by the performance of the contract, in order to make the performance possible, promises to pay for the labor and materials if the laborers and material men will go on, such a promise is to answer for the debt of another, yet it is not a contract of

⁶⁰ Chaplin v. Atkinson, 45 Ark. 67; Carville v. Crane, 5 Hill (N. Y.), 483.

⁶¹ Smith v. Finch, 2 Scam. (Ill.) 321.

⁶² Darst v. Bates, 95 Ill. 493.

⁶³ Wilson v. Hentges, 29 Minn. 102; Cardell v. McNeil, 21 N. Y. 336; Melone v. Keener, 44 Pa. St. 107; Barker v. Scudder, 56 Mo. 272; Beaty v. Grim, 18 Ind. 131; Thomas v. Dodge, 8 Mich. 50; Wyman v. Goodrich, 26 Wis. 21. Compare Dows v. Sweet, 120 Mass. 322; 127 Mass. 364; 134 Mass. 140; Harsinger v. Newman, 83 Ind. 124.

surety, and need not be in writing. Such a promise is original, and not within the statute.⁶⁴ Because the leading object is to promote some interest of his own, and so the promise is not within the statute, although the effect is to release or suspend the debt of another.⁶⁵

The distinction is between a promise, the object of which is to promote the interest of another, and one in which the object is to promote the interest of the party making the promise. The former is within the statute; the latter is not affected by it. But when the promisor is himself to receive the benefit for which the promise is exchanged, it is not usually material whether the original debtor remains liable or not;⁶⁶ this is the general rule, but there are cases which hold that the statute applies in spite of the benefit obtained, if the original liability is allowed to remain.⁶⁷

§ 392. RELINQUISHMENT OF A LIEN.—If there is a new consideration moving from the promisee to the promisor, then the superadded consideration makes a new agreement, which is not within the statute of frauds. Thus, where a party releases a chattel mortgage upon property, and allows the mortgagor to sell the property, in consideration that his debt shall be paid when the money is received from the property thus sold, the oral promise to pay the mortgagee who, of course, holds the note, subject to a lien for a debt incurred by former owner, who agrees to pay the lien to the holder of the lien forbearing to enforce the same, this is not a promise to pay the debt of another, and is not within the statute.⁶⁸ So also if the owner of a vessel subject to a lien for a debt incurred by the former owner, agrees to pay the lien, on the holder of the lien forbearing to enforce the

⁶⁴ *Nelson v. Boynton*, 3 Met. 396; *Hall v. Alfred* (Ky.), 49 S. W. Rep. 444.

⁶⁵ *Clifford v. Lohring*, 69 Ill. 401; *Walker v. Hill*, 119 Mass. 249; *Merriman v. McManus*, 102 Pa. St. 102; *Kelly v. Schupp*, 60 Wis. 76; *Crawford v. Edison*, 45 Ohio St. 239; *Emerson v. Slater*, 22 How. 43.

⁶⁶ *Calkins v. Chandler*, 36 Mich. 324; *Jefferson v. Slagle*, 66 Pa. St. 202.

⁶⁷ *Morrissey v. Kinsey*, 16 Neb. 17; *Sext v. Geise*, 80 Ga. 698; *Wilhelm v. Voss* (Mich.), 76 N. W. Rep. 308.

⁶⁸ *Powers v. Rankin*, 114 Ill. 52; *Fears v. Story*, 131 Mass. 47; *Bluthenthal v. Moore* (Ga.), 32 S. E. Rep. 344.

same, this is not a promise to pay the debt of another within the statute of frauds.⁶⁹ So where the creditor has, in consideration of the promise of a third person, relinquished some lien or advantage for securing his debt, and transfers that interest or some equivalent thereof to the third party, it is a new and independent contract between the parties, although the result is that the payment of the debt of another is incidentally or indirectly affected.⁷⁰

But the weight of authority is that if there is no other consideration for the promise, and the release of the lien upon the property was not beneficial to the promisor, such promise to pay, unless in writing, would be void under the statute.⁷¹

But there is a conflict of authority. In Wisconsin it has been held, which seems to militate against some prior decisions, that so long as the original debt remains payable by the debtor to his creditor, any arrangement by which another promises to pay that debt is within the very letter of the statute, no matter from what source the consideration of the latter promise is derived.⁷² In New York, when the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor or beneficial to him, and such that the promisor thereby carries under an independent duty of payment irrespective of the liability of the principal debtor.⁷³

In Massachusetts, if the main object of the promisor is some benefit to himself, while the benefit to the debtor is only incidental, the promise is not within the statute.⁷⁴

In other States a new consideration of benefit to the promisor is enough to take the case out of the statute;⁷⁵ and the purpose of the promisor is taken into consideration in some of the

⁶⁹ *Fears v. Story*, 131 Mass. 47.

⁷⁰ *Curtis v. Brown*, 5 Cush. 488; *Furbish v. Goodman*, 98 Mass. 296.

⁷¹ *Young v. French*, 15 Wis. 116; *Weisel v. Spence*, 59 Wis. 301; *Mallory v. Gillett*, 21 N. Y. 413.

⁷² *Hooker v. Russell*, 67 Wis. 257.

⁷³ *Rintoul v. White*, 108 N. Y. 222.

⁷⁴ *Nelson v. Boynton*, 3 Met. 396.

⁷⁵ *Westmoreland v. Porter*, 75 Ala. 452; *Chaplin v. Atkinson*, 45 Ark. 67.

States.⁷⁶ And some decisions call the special attention to the intent of the parties as the test of the agreement of the promise, whether original or not.⁷⁷

It seems that the intent of the parties and the various circumstances surrounding the transaction and the character of the promise should form satisfactory evidence of the real intention.⁷⁸

But the mere forbearance to enforce the lien is not sufficient to take the case out of the statute;⁷⁹ and where the lien is not released by the holder, the promise must be in writing.⁸⁰

§ 393. PROMISE TO PERFORM THE OBLIGATION OF ANOTHER PERSON.—Wherever there is in existence an obligation on the part of another, a promise to perform that obligation if he does not, is not within the statute if it is made upon a new consideration inuring to the benefit of the promisor, although the former obligation is not extinguished, provided the chief purpose of the promisor is to obtain a benefit for himself.⁸¹

But where the former obligation is not extinguished, or where the new obligation is not substituted for it as a new consideration, such promise is within the statute, and must be in writing to be enforceable.⁸²

⁷⁶ *Spann v. Cochran*, 59 Tex. 640.

⁷⁷ *Clifford v. Luhling*, 69 Ill. 401; *Corkins v. Collins*, 16 Mich. 478; *Stratton v. Hill*, 134 Mass. 27; *Fitzgerald v. Morrissey*, 14 Neb. 193; *Green v. Burton*, 59 Vt. 423.

⁷⁸ *Montstephen v. Lakeman*, L. R. 5 Q. B. 613.

⁷⁹ *Music v. Music*, 7 Mo. 495; *Rintoul v. White*, 108 N. Y. 222; *Vaughn v. Smith*, 65 Iowa, 579; *Lang v. Henry*, 54 N. H. 57; *Stewart v. Campbell*, 58 Me. 459.

⁸⁰ *Griffin v. Hoag*, 105 Iowa, 499.

⁸¹ *Powers v. Rankin*, 114 Ill. 52; *Merriman v. McManus*, 102 Pa. St. 102; *Crawford v. Edison*, 45 Ohio St. 239; *Railroad Co. v. Houston*, 85 Tenn. 224; *Spann v. Cochran*, 63 Tex. 240; *Walker v. Hill*, 119 Mass. 249; *Fitzgerald v. Morrissey*, 14 Neb. 198.

⁸² *Sext v. Geise*, 80 Ga. 698; *Palmer v. Blinn*, 55 Ind. 11. Compare *Vaughn v. Smith*, 65 Iowa, 579; *Studley v. Booth*, 54 Mich. 6; *Haverly v. Mercer*, 78 Pa. St. 257; *Hooker v. Russell*, 67 Wis. 257; *Walker v. Fleming*, 103 Ind. 105.

§ 394. *DEL CREDERE CONTRACTS*.—*Del credere* is a contract where the agent or factor, in consideration of an increase of commission, absolutely engages to pay to his principal the price of the goods which he sells for his consignor.⁸³ It is in the nature of a contract of guaranty, where the factor or broker guarantees his sales. Such an undertaking does not come within the statute of frauds; it is not collateral, but an original contract, an absolute agreement that the prices for which the goods are sold, or the debt created by the sale of the goods, shall be paid to the principal when the credit given on the sale shall have expired.⁸⁴

The liability of the factor is original, and his guaranty need not be in writing.⁸⁵ The *del credere* guaranty is an original one entered into in performance of the guarantor's own responsibility, and in no sense a special promise to pay the debt of another within the meaning of the statute of frauds.⁸⁶ The weight of authority in the United States is that the contract is made directly with the principal, to pay him on the expiration of the term of credit, whether the purchaser be solvent or not, and is an original undertaking without any relation to the debt or liability of another. The law allows the factor to sue in his own name for the debt; and the principal has also the right to sue, but not the exclusive right. But this does not convert an express original undertaking of the factor with his principal absolutely to pay a debt at maturity, into a collateral and conditional agreement to pay the debt if the purchaser does not. The guaranty by the factor differs very especially from a promise to pay the debt of another in another particular: The prin-

⁸³ *National Rubber Co. v. Sims*, 44 Neb. 148.

⁸⁴ *Bradley v. Richardson*, 23 Vt. 720; 2 Blatchf. 343.

⁸⁵ *Swan v. Nesmith*, 7 Pick. 220.

⁸⁶ *Bullowa v. Orga*, 57 N. J. Eq. 428; *Courturier v. Hastie*, 8 Exch. 40; *Wolff v. Koppel*, 5 Hill (N. Y.), 458; *Osborne v. Baker*, 34 Minn. 307; *Seeman v. Inman*, 6 Mo. App. 384; *Wickham v. Wickham*, 2 Kay & J. 478; *Grover v. Dubois*, 1 Term R. 112; *Bize v. Dickanson*, 1 Term R. 285. Some English cases hold a contrary view—*Morris v. Cleasby*, 4 Maule & Sel. 566; *Peele v. Northcote*, 7 Taunt. 478.

principal transfers a right in his own name to collect the debt and hold the money, accounting only for the net proceeds. But this does not come within the statute of frauds.⁸⁷ Some late English cases and a few American cases hold that the factor's liability is as a surety merely, and his contract of guaranty comes within the statute. But the great weight of authority in the United States is to the effect that one who sells under such a commission is liable absolutely and originally to his principal, or consignor, and the contract does not come within the statute of frauds.⁸⁸

§ 395. TO WHOM THE PROMISE MUST BE MADE.—In order that the promise may be within the statute, it must be made to the creditor under either rule.⁸⁹ Hence, a promise made to the debtor to pay a debt which he owes himself to a third person is not a promise to answer for the debt of another within the meaning of the statute.⁹⁰

It cannot be said that the promise to indemnify the surety is made to him as debtor and not as creditor. The surety and principal are bound to the creditor. It is when the surety has changed his relation of debtor to the creditor and assumed that of creditor to his principal, by paying to the original creditor the debt for which both he and his principal were bound, that a right arises to go against the guarantor on his contract. It is to the surety under a conditional and contingent liability that the promise is made; but it is to him as creditor of the principal, and not as debtor, that a right of action arises on it. Nor is it sufficient to take the case from the operation of the statute that the liability of the principal arises by implication rather than by

⁸⁷ *Sherwood v. Stone*, 14 N. Y. 267.

⁸⁸ *Balderstone v. Rubber Co.*, 18 R. I. 338; *Lewis v. Brehme*, 33 Md. 112. See, also, *Mackenzie v. Scott*, 6 Bro. P. C. 280; *Grove v. Dubois*, 1 Term R. 112.

⁸⁹ *Aldrich v. Ames*, 9 Gray, 76; *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Crim v. Fitch*, 53 Ind. 214; *Lee v. Newman*, 55 Miss. 365.

⁹⁰ *Ware v. West*, 64 Miss. 545; *Windell v. Hudson*, 102 Ind. 521; *Holl v. Bailey*, 58 Wis. 434.

express contract. This is the doctrine held by those courts which require the contract of indemnity to be in writing.⁹¹

§ 396. CONTRACT FOR THE BENEFIT OF THE PROMISOR.—In some States the rule is that it is a presumption of law, that if any direct benefit to the promisor is the object sought to be obtained by his promise, he must be understood to intend an original undertaking, which is not within the statute.⁹²

And wherever there is in existence an obligation on the part of another, a promise to perform that obligation if he does not, or to guarantee his performance, is not within the statute, if it is made upon a new consideration inuring to the benefit of the promisor, although the former obligation is not extinguished, provided the chief purpose of the promisor is to obtain benefit to himself.⁹³

§ 397. SPECIAL PROMISE—WHEN ORIGINAL DEBTOR IS RELEASED.—Where the original debtor is entirely released and the obligation or promise of another is substituted in the place of that of the debtor, who is discharged, a new debt is thereby created, binding on the substituted debtor, which is not affected by the provision of the statute of frauds, which declares that every special promise to answer for the debt, default or miscarriage of another is void unless it is in writing.⁹⁴ Thus, where a purchaser of personal property agreed verbally, in consideration of the purchase, to pay certain debts of his vendor due to a third

⁹¹ *May v. Williams*, 61 Miss. 125. So under whichever doctrine the promise is made, it must be made to the creditor.

⁹² *Westmoreland v. Porter*, 75 Ala. 452; *Chapline v. Atkinson*, 45 Ark. 67; *Lerch v. Gallup*, 67 Cal. 595.

⁹³ *Ressiter v. Waterman*, 151 Ill. 169; *Clifford v. Luhring*, 69 Ill. 401; *Thornton v. Williams*, 71 Ala. 555; *Fears v. Story*, 131 Mass. 47; *Fitzgerald v. Morrissey*, 14 Neb. 198; *Merriam v. McManus*, 102 Pa. St. 102; *Dickson v. Conde*, 148 Ind. 279; *Lookout Mount. R. R. Co. v. Houston*, 85 Tenn. 224; *Spann v. Cochran*, 63 Tex. 240; *Williamson v. Hill*, 3 Mackay, 100; *Bluthenthal v. Moore* (Ga.), 32 S. E. Rep. 344; *Craft v. Kendrick*, 39 Fla. 90.

⁹⁴ *Thornton v. Guice*, 73 Ala. 321; *Howell v. Field*, 70 Ga. 592.

person, the promise is not a collateral, but an original promise, and, hence, not within the statute.⁹⁵

And when the promise is in effect to pay his own debt, though that of a third person he incidently guaranteed, it need not be in writing.⁹⁶

§ 398. SALE OF GOODS—LIABILITY OF THIRD PARTY.—A party often becomes responsible for goods sold to another, and if the goods are supplied entirely on the credit of the promisor, so the third party is not liable at all, then the promise to pay is not within the statute; whenever the third party would become liable the contract must be in writing.⁹⁷ Where a third party would become liable for the property so sold to another, it is collateral, and the fact that the creditor relied chiefly upon the promise will make no difference. If the credit is given to a third person instead of the promisor, then it is within the statute, if such is the contract where one agrees to pay the debt of another.⁹⁸

§ 399. JOINT LIABILITY.—If a party purchases goods to be delivered to another, or promises to pay for goods that may be purchased and received by a third, the promise is clearly an original contract, an engagement to pay his own debt, and not the debt of another party. So if two jointly promise to pay for

⁹⁵ *Wilson v. Bevans*, 58 Ill. 232; *Meyer v. Hartman*, 72 Ill. 442; *Borchsenius v. Canutron*, 100 Ill. 82; *Curtis v. Brown*, 18 Pick. 467; *Malcrone v. Lumber Co.* 55 Mich. 622; *Robbins v. Apgar*, 10 Mo. 538; *Brown v. Kortz*, 37 Iowa, 239; *Booth v. Eighmie*, 60 N. Y. 238; *Parker v. Heaton*, 55 Ind. 1; *Yale v. Edgerton*, 14 Minn. 194; *Fairlie v. Denton*, 8 B. & C. 395.

⁹⁶ *Darst v. Bates*, 95 Ill. 493; *Mallory v. Gillett*, 25 N. Y. 412; *Smart v. Smart*, 97 N. Y. 559; *Palmer v. Witcherly*, 15 Neb. 98; *Taylor v. Preston*, 79 Pa. St. 436; *Catt v. Roat*, 17 Mass. 229.

⁹⁷ *Lance v. Pearce*, 101 Ind. 595; *Walker v. Hill*, 119 Mass. 249; *Sutherland v. Coster*, 52 Mich. 151; *Grant v. Wolf*, 34 Minn. 32; *West v. O'Hara*, 55 Wis. 645.

⁹⁸ *Welch v. Marvin*, 36 Mich. 59; *Radcliff v. Poundstone*, 23 W. Va. 724; *Wills v. Ross*, 77 Ind. 1; *Cahill v. Bigelow*, 18 Pick. 369; *Bugbee v. Kendrickson*, 130 Mass. 437; *Chase v. Day*, 17 Johns. 114; *Cole v. Hutchinson*, 84 Minn. 410; *Cowdin v. Cottgetren*, 55 N. Y. 650.

goods delivered to a second party, the two are joint original debtors. It is a joint promise to pay the indebtedness of the two and not a promise by them to pay the debt of another. Such a promise is not within the statute. If the credit is given to the person to whom the goods are delivered, the promise of a third person to pay for them, though made at the same time, is a promise to pay the debt of another, and is within the statute.⁹⁹ When the sale of goods is upon joint credit, the promise of two, though the property is purchased for and delivered to but one, the legal effect as between them and the vendor, is a sale to the two jointly. Such a promise is an original one as between them and the promisee, and it is not within the statute.¹⁰⁰

§ 400. ORAL CONTRACT OF INSURANCE.—An oral executory contract of insurance is valid, as it is an original contract, and the statute of frauds has no application.¹⁰¹ Such contract is not made to answer for the debt, default or miscarriage of another, but is an original contract between the insurance company, represented generally by an agent, and the party to be insured.¹⁰²

§ 401. TO ANSWER FOR THE TORTS OF ANOTHER.—A promise to answer for the torts of another comes within the statute of frauds, and therefore must be in writing. Thus, where a party has converted the goods of another, an oral promise to answer for such tort by a third party is void.¹⁰³ And so where a hirer of a horse unlawfully rides it to death, an oral promise by a third party to pay the damages to the owner is not binding, as it comes within the statute of frauds, under the words "miscarriage" and "default."¹⁰⁴

⁹⁹ *Hetfield v. Down*, 27 N. J. L. 440.

¹⁰⁰ *Stone v. Walker*, 13 Gray, 612; *Gibbs v. Blanchard*, 15 Mich. 292; *Boyce v. Murphy*, 91 Ind. 1; *Rottman v. Fix*, 25 Mo. App. 571.

¹⁰¹ *Croft v. Ins. Co.*, 40 W. Va. 508; *Ins. Co. v. Colt*, 20 Wall. 560.

¹⁰² *National Fire Ins. Co. v. Rawe* (Ky.), 49 S. W. Rep. 422.

¹⁰³ *Turner v. Hubbell*, 2 Day (Conn.), 457.

¹⁰⁴ *Kirkham v. Marter*, 2 Barn. & Ald. 613, distinguishing *Reed v. Nash*, 1 Wilson, 305.

CHAPTER XV.

BAIL.

§ 402. **BAIL DEFINED.**—Bail as a noun means one or more sureties themselves. It is the delivery or bailment of a person to his sureties upon their giving a bond, the defendant being the principal, for his appearance, he being supposed to continue in their friendly custody, instead of going to prison.¹ As a verb, it means to deliver the defendant to sureties who give security for his appearance in court at the return of the writ.²

The sureties undertake to surrender the defendant when he is called upon to answer the charge.³ Civil bail is that bail taken in civil cases.

§ 403. **DISTINCTION BETWEEN BAIL AND MAINPERNORS.**—Bail and mainpernors are both sureties for the appearance of their principal. Bail may, and mainpernors may not, surrender their principal. Bail are only sureties that the party be answerable for the specific matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever.⁴ Bail will only be considered in this connection.

§ 404. **ARREST IN CIVIL ACTION.**—The right to arrest a party in a civil action is greatly abridged by the abolition of imprisonment for debt. Now arrests can be made only in actions *ex delicto*, or for torts, in no wise connected with a contract.⁵ A party may be arrested when he perpetrates a fraud in contract-

¹ Bearden v. State, 89 Ala. 21; Rinhard v. Calemby, 49 Ohio St. 257;

⁴ Bl. Com. 297; Ramsey v. Coolbaugh, 13 Iowa, 164.

² 2 Bl. Com. 290.

³ Ramsey v. Commonwealth, 83 Ky. 534, 538.

⁵ Whipple v. People, 40 Ill. App. 301.

⁴ Bowen v. Burdick, 3 Clark (Pa.), 227; Donovan v. Cornell, 3 Day (Conn.), 339.

ing an indebtedness, or where he fraudulently conceals his property or the disposition of it with a view of defrauding his creditors, and when he is about to abscond with the purpose of cheating his creditors.

Factors, brokers and agents, and all persons in a fiduciary capacity may be arrested and held in bail. A party may be arrested *vi et armis*;⁶ for criminal conversation;⁷ for trover and conversion;⁸ for false imprisonment;⁹ for deceit;¹⁰ for malicious prosecution;¹¹ for libel and slander.¹²

§ 405. OBLIGATION OF BAIL.—The obligation of bail arises from contract and the law jointly, which extend his privilege beyond the express condition of the bond. The statute generally subjects the bail in case of the principal's avoidance and a return of *non est inventus* on the execution. This event does not take place on the omission to surrender the principal in court, nor until after the exercise of due diligence the execution is legally returned.¹³ Either the refraining from surrendering of the principal or the sureties' promise to pay the execution on which the principal was arrested, is a consideration for the agreement by the creditor to continue the matter from week to week.¹⁴ The bail in civil cases sustains the character of sureties in the same manner as sureties for an appeal.¹⁵ The bail must either deliver the principal at the time designated or pay an amount not exceeding the penalty, with costs and interest.¹⁶

⁶ *Davis v. Scott*, 15 Abb. Pr. 127.

⁷ *Dyott v. Dean*, 2 Chit. 72.

⁸ *Lopenan v. Henderson*, 4 Pa. St. 232; *Dugins v. Edwards*, 17 How. Pr. 290.

⁹ *Cox v. Highley*, 100 Pa. St. 252.

¹⁰ *Redfield v. Frear*, 9 Abb. Pr., N. S., 444.

¹¹ *Orton v. Noonan*, 32 Wis. 220; *Dempsey v. Lipp*, 15 How. Pr. 11.

¹² *McCawley v. Smith*, 4 Yeates (Pa.), 193; *Life Ins. Co. v. Ecclesine*, 6 Abb. Pr., N. S., 23.

¹³ *Hall v. White*, 27 Conn. 488.

¹⁴ *Thompson v. Way*, 173 Mass. 423.

¹⁵ *Culliford v. Walser*, 158 N. Y. 65.

¹⁶ *New Haven Bank v. Miles*, 5 Conn. 587. Compare *Garibaldi v. Cagnoni*, 6 Mod. 266.

If the bond is not executed in accordance with the statute, yet it may be a good common-law obligation and hold the parties to their agreement.¹⁷

§ 406. RIGHTS OF BAIL.—The rights of bail are in many respects the same as those of other sureties. Like other sureties they are discharged by change in the contract without their consent.¹⁸ They are liable for their principal only, and not for a joint defendant.¹⁹ The bail may be subrogated to the creditors' rights against the principal in civil actions.²⁰ Bail is not liable for their principal's failure.²¹ The surety has a right in civil cases of indemnity against his principal;²² but he cannot resort to any person who was jointly liable with his principal.²³ In civil proceedings the bail is entitled upon an implied contract to indemnity for costs incurred incidental to his position.²⁴

§ 407. EXTENT OF LIABILITY.—The liability of the sureties on a bail bond is limited by the penalty of the bond with interest from the time of *non est inventus* is made on the execution.²⁵ At common law, whether by bond to the officer in the first instance or recognizance in the court above, the liability of the sureties is limited by the penalty named. The bail bond is an agreement to deliver up the principal when reasonably demanded to satisfy the judgment which the creditor may recover

¹⁷ *Beveridge v. Chatlain*, 1 Ill. App. 594; *Bell v. Pierce*, 146 Mass. 58; *Robeson v. Thompson*, 9 N. J. L. 97; *Haberstro v. Belford*, 118 N. Y. 187; *Koons v. Seward*, 8 Watts (Pa.), 388; *Hadley v. Ewings*, 4 Bibb (Ky.), 505; *Holmes v. Chadbourne*, 4 Me. 10.

¹⁸ *Bullen v. Dresser*, 116 Mass. 287; *Campau v. Seeley*, 30 Mich. 57; *Dean v. Parker*, 17 Mass. 591.

¹⁹ *Jackson v. Hampton*, 10 Ired. (N. C.) L. 579.

²⁰ *Parsons v. Briddock*, 2 Vern. 608.

²¹ *Hinton v. Odenheimer*, 4 Jones Eq. (N. Car.) 406.

²² *Adair v. Campbell*, 4 Bibb (Ky.), 13.

²³ *Cunningham v. Clarkson*, *Wright* (Ohio), 217; *Bowman v. Blodgett*, 2 Met. (Mass.) 308.

²⁴ *Fisher v. Fallows*, 5 Esp. 171; *Green v. Creswell*, 10 Ad. & El. 453.

²⁵ *Heustis v. Rivers*, 103 Mass. 398.

against the principal, not exceeding the penalty of the bond.²⁶ Of course the interest and costs must be included.²⁷

§ 408. DISCHARGE OF PRINCIPAL IN BANKRUPTCY OR INSOLVENCY.—The discharge of the principal in insolvency or bankruptcy is a bar to an action thereon against him for a breach occurring before the discharge, but it does not release the sureties on the recognizance.²⁸ But the surety, after paying the liability, may recover against the principal, notwithstanding his discharge, when the debt is not made certain until the principal's discharge.²⁹

The fact the creditor has proved his claim in insolvency upon judgment against the debtor is no bar to an action against a surety on a recognizance;³⁰ though the bail should have the benefit of any dividends declared. The discharge of the principal releases the bail without surrender of the principal if obtained before the bail is fixed.³¹ After the bail has been fixed, and the right to surrender the principal is extinguished, his discharge will not release the sureties.³²

§ 409. PAYMENT BY IMPRISONMENT OF PRINCIPAL.—In some cases the principal debtor can be arrested and imprisoned for the debt if not paid. At law, such arrest is a satisfaction of the

²⁶ *New Haven Bank v. Miles*, 5 Conn. 587.

²⁷ *Walker v. Waterman*, 50 Vt. 107; *Richards v. Morse*, 36 Me. 240; *Kenan v. Carr*, 10 Ala. 867. Some decisions hold that the bail are not liable for interest on the judgment recovered against the principal. *Gray v. Cook*, 3 Houst. (Del.) 49; *Bowyer v. Hewitt*, 2 Gratt. (Va.) 193.

²⁸ *Demelman v. Hunt*, 168 Mass. 102.

²⁹ *Buel v. Gordon*, 6 Johns. 126.

³⁰ *Harris v. Hayes*, 171 Mass. 275.

³¹ *Champion v. Noyes*, 2 Mass. 481; *Olcott v. Lilly*, 4 Johns. 407; *Nettleton v. Billings*, 17 N. H. 453; *Clagett v. Ward*, 5 Cranch, C. C. 669; *Kennedy v. Adams*, 5 Harr. (Del.) 160; *Jones v. Ellis*, 10 Ad. & El. 382; *Rowland v. Stevenson*, 6 N. J. L. 149; *Boggs v. Teackle*, 5 Binn. (Pa.) 332; *Belknap v. Davis*, 21 Vt. 409.

³² *Woolley v. Cobb*, 1 Burr. 244; *Demelman v. Hunt*, 168 Mass. 102; *Franklin v. Thurber*, 1 Cow. (N. Y.) 427; *Munroe v. Towers*, 2 Cranch, C. C. 187.

judgment so long as the imprisonment continues, and during that period no action can be taken by the judgment creditor against one standing as surety for the debt. The imprisonment suspends the lien of the judgment upon the principal's property, and the creditor meanwhile can bring no action on the judgment for its payment. If the judgment cannot be enforced against the principal, it cannot be enforced against the surety.³³

§ 410. DIFFERENT SETS OF SURETIES.—As between different sets of sureties, undertaking to secure the same debt, although at different stages of legal proceedings, the primary liability rests upon the last set. So bail upon discharge from an order of arrest are sureties within the above rule.³⁴ The latter sureties are primarily liable as between themselves and the first sureties; so the release of the latter set by the creditor discharges the first set, because it deprives them of a remedy over to which they otherwise would have been entitled.³⁵

§ 411. EXONERATION OF BAIL.—The bail may be exonerated from liability in many ways. Enlistment of the principal in the military of the government and going out of the State releases the bail,³⁶ though many courts hold a contrary doctrine.³⁷ If anything happens which will entitle the principal to an immediate discharge from custody, it will also liberate the sureties from liability.³⁸ If judgment is rendered in favor of the principal so it is impossible to surrender him, the bail are released,³⁹ even if the judgment is reversed for error.⁴⁰

³³ Koenig v. Steckel, 58 N. Y. 475.

³⁴ Toles v. Adea, 84 N. Y. 222.

³⁵ Culliford v. Walser, 158 N. Y. 65.

³⁶ McFarland v. Wilber, 35 Vt. 342.

³⁷ Sayward v. Conant, 11 Mass. 146; Grigrich v. People, 34 Ill. 448; Huggins v. People, 30 Ill. 443; Winninger v. State, 23 Ind. 228.

³⁸ Shields v. Smith, 78 Ind. 425.

³⁹ Lockwood v. Jones, 7 Conn. 439.

⁴⁰ Butler v. Bissel, 1 Root (Conn.), 102; Duncan v. Tindall, 20 Ohio St. 567.

Laches may discharge the bail;⁴¹ but not if no injury is done them.⁴² If the creditor enters into a valid agreement with the principal by which time is given the latter, the bail is released.⁴³ And in some States the refusal to proceed against the principal at the request of the bail releases them.⁴⁴

After the suit is brought an amendment in the cause of action discharges the sureties; however, if the amendment does not change the cause of action, it is otherwise.⁴⁵ So by adding a new cause of action discharges the bail,⁴⁶ unless the judgment is rendered on the original cause of action.⁴⁷ So a removal of the cause of action releases the bail;⁴⁸ so if the case is submitted to arbitration.⁴⁹ Fraudulent acts of the creditor will release the bail.⁵⁰

Imprisonment of principal which ends before judgment against the bail will not discharge them,⁵¹ nor imprisonment which does not prevent surrender of the principal.⁵² But taking the principal on execution releases them.⁵³

§ 412. EXONERATION BY PERFORMANCE OF CONDITION.—By performance of the condition of the bond, or by some act excusing the performance, will discharge the bail. This performance may be by paying the debt or by surrender of the principal.⁵⁴ When the performance becomes impossible by the act of

⁴¹ *Toles v. Adea*, 84 N. Y. 222.

⁴² *Vandergazelle v. Rodgers*, 57 Mich. 132.

⁴³ *Rathborne v. Warren*, 10 Johns. 567.

⁴⁴ *Toles v. Adea*, 84 N. Y. 239.

⁴⁵ *Carrington v. Ford*, 4 Cranch, C. C. 231; *Brown v. Howe*, 3 Allen, 528.

⁴⁶ *Hyer v. Smith*, 3 Cranch, C. C. 437; *Willis v. Crooker*, 1 Pick. 204.

⁴⁷ *Seeley v. Brown*, 14 Pick. 177.

⁴⁸ *Campau v. Seeley*, 30 Mich. 57.

⁴⁹ *Bean v. Parker*, 17 Mass. 591.

⁵⁰ *Stevens v. Bigelow*, 12 Mass. 437; *Mott v. Hazen*, 27 Vt. 208; *Bishop v. Earl*, 17 Wend. 316.

⁵¹ *Sedberry v. Conner*, 77 N. Car. 319.

⁵² *Steelman v. Mattiv*, 38 N. J. L. 247.

⁵³ *Milner v. Green*, 2 Johns. Cas. 283; *Warren v. Gilmer*, 11 Cush. 15. Compare *Stewart v. McGuin*, 1 Cow. (N. Y.) 99.

⁵⁴ *Appleby v. Robinson*, 44 Barb. 316; *Chase v. Holton*, 11 Vt. 347; *Ruggles v. Covey*, 3 Conn. 419; *Chields v. Smith*, 78 Ind. 425.

God, or of law, or of the obligee, the bail is released,⁵⁵ and also when the performance becomes useless.⁵⁶

The death of the principal at any stage of the suit before the return of the writ against the principal, entitles the bail to a discharge.⁵⁷ After the return of the writ and the bail is fixed, death does not discharge them.⁵⁸ But death of the principal within any time fixed by the statute will discharge the bail.⁵⁹

§ 413. BAIL IN CRIMINAL CASES.—By a recognizance of bail in a criminal action the principal is, in theory of the law, committed to the custody of the sureties as jailers of his own choosing, not that he is subject or can be subjected by them to constant imprisonment, but that he is so far supposed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, to the extent necessary to accomplish this may restrain him of his liberty.⁶⁰

Although the rights and liability of sureties on a recognizance are in many respects different from those of sureties on ordinary or commercial bonds, yet their positions are similar in respect to the limitation of their liability to the precise terms of their contract and the effect upon such liability of any change in these terms without their consent.⁶¹

The relation of principal and surety between the principal and his bail exists only in a qualified sense. And it is against public policy to aid the bail to relieve themselves from punish-

⁵⁵ *Taylor v. Taintor*, 16 Wall. 366; *Nettleton v. Billings*, 17 N. H. 453; *Steelman v. Mattix*, 38 N. J. L. 247; *Palmer v. Merriwether*, 7 J. J. Marsh. 506.

⁵⁶ *Todd v. Maxfield*, 3 Bar. & Cr. 222; *White v. Guest*, 6 Blackf. (Ind.) 228; *Beers v. Haughton*, 1 McLearn 226; *Boggs v. Teackle*, 5 Binn. 332; *Shields v. Smith*, 78 Ind. 425.

⁵⁷ *Griffin v. Moore*, 2 Ga. 331.

⁵⁸ *Rawlings v. Gunstern*, 6 Term R. 284; *Davidson v. Taylor*, 12 Wheat. 604; *Hamilton v. Dunblee*, 1 N. H. 172; *Olcott v. Lilly*, 4 Johns. 407.

⁵⁹ *Mount Pleasant Bank v. Pollock*, 1 Ohio, 35; *Walsh v. Schulz*, 13 Daly, 132.

⁶⁰ *State v. Sureties*, 4 Wyo. 347; *Reese v. United States*, 9 Wall. 13.

⁶¹ *State v. Sureties*, 4 Wyo. 347.

ment meted out to them for their neglect in failing to surrender their principal to justice.⁶² They bind themselves that their principal shall appear and answer the charge, and if he fails to do so, the condition is broken and they become liable to the penalty.

Their liability is limited to the precise terms of the bond, and if any change is made in the contract without their consent they will be discharged, though it inures to their benefit.⁶³ And if the bail is illegally taken, the sureties are not bound.⁶⁴

The object of bail in civil cases is either directly or indirectly to secure the payment of a debt or other civil duty; while the object of bail in criminal cases is to secure the appearance of the principal before the court for the purpose of public justice.

Payment by the bail in a civil case discharges the obligation of the principal to his creditor, and is only required to the extent of that obligation, whatever the penalty of the bond or recognizance, whilst payment by the bail of their recognizance in criminal cases, though it discharges the bail, does not discharge the obligation of the principal to appear in court; that obligation still remains, and the principal may, at any time, be retaken and brought into court.

§ 414. RIGHTS AND LIABILITY OF BAIL.—The bail becomes the bailers of the principal, though they cannot actually confine him. They may terminate their obligation by arresting and surrendering him into the hands of the court,⁶⁵ without process,⁶⁶ by their agent by written authority when not in their presence,⁶⁷ and pursue him into another State and arrest him,⁶⁸ within the jurisdiction of the United States.⁶⁹ They may arrest him on

⁶² *United States v. Ryder*, 110 U. S. 729.

⁶³ *Reese v. United States*, 9 Wall. 13.

⁶⁴ *State v. Vion*, 12 La. Ann. 688; *Governor v. Fay*, 8 La. Ann. 490.

⁶⁵ *Norfolk v. People*, 43 Ill. 9; *Hughes v. State*, 28 Tex. App. 499; *Taylor v. Taintor*, 16 Wall. 371; *Nicolls v. Ingersoll*, 7 Johns. 145.

⁶⁶ *Taylor v. Taintor*, 16 Wall. 371; *State v. Lingerfelt*, 109 N. Car. 775.

⁶⁷ *Taylor v. Taintor*, 16 Wall. 366; *State v. Lazarre*, 12 La. Ann. 166.

⁶⁸ *Taylor v. Taintor*, 16 Wall. 366; *State v. Lingenfelter*, 109 N. Car. 775.

⁶⁹ *Reese v. United States*, 9 Wall. 13.

Sunday,⁷⁰ and break into his house if necessary to make the arrest,⁷¹ after making demand to enter and refusal by the principal,⁷² and may require the assistance of an officer;⁷³ and if the State does not aid such sureties upon proper demand to arrest the principal, they will be released.⁷⁴

If the bail voluntarily permit their principal to leave the State they are liable for his appearance,⁷⁵ even if the principal is a minor and is removed by his mother;⁷⁶ nor will insanity of the principal release them from their obligation to produce him.⁷⁷ Nothing will release them but the death of the principal or act of God.

However, if the State has consented to the principal's placing himself beyond the reach of the sureties, they will be exonerated for not producing him.⁷⁸

§ 415. IMPLIED CONTRACT OF INDEMNITY TO BAIL.—Without an express contract of indemnity to bail in a criminal action for the appearance of his principal, the bail cannot maintain an action against the principal to recover any sum he may have been obliged to pay by reason of forfeiture of the principal; and so he is not entitled to be subrogated to the right of the State and to enjoy the benefits of the State's priority, as such subrogation is against public policy.⁷⁹ But an implied promise to

⁷⁰ *Taylor v. Taintor*, 16 Wall. 366.

⁷¹ *Taylor v. Taintor*, 16 Wall. 366; *Read v. Case*, 4 Conn. 166.

⁷² *Read v. Case*, 4 Conn. 166.

⁷³ *State v. Cunningham*, 10 La. Ann. 393.

⁷⁴ *Commonwealth v. Querly*, 80 Ky. 208.

⁷⁵ *State v. Horn*, 70 Mo. 466; *State v. Scott*, 20 Iowa, 63; *Hartington v. Dennie*, 13 Mass. 92; *Taylor v. Taintor*, 16 Wall. 366; *King v. State*, 18 Neb. 375; *Yarbrough v. Commonwealth*, 80 Ky. 151; *Devine v. State*, 5 Sneed, 623.

⁷⁶ *Starr v. Commonwealth*, 7 Dana, 243.

⁷⁷ *Adler v. State*, 35 Ark. 517.

⁷⁸ *Rathbone v. Warren*, 10 Johns. 587; *Niblo v. Clark*, 3 Wend. 24; 6 Wend. 236; *Bowmaker v. Moore*, 7 Price, 223; 3 Price, 214.

⁷⁹ *United States v. Ryder*, 110 U. S. 729; *Cripps v. Hartnoll*, 4 B. & S. 414. Compare *Reynolds v. Harral*, 2 Strob. (S. Car.) 87; *Simpson v. Roberts*, 35 Ga. 180.

indemnify a bail in criminal cases may be sustained in regard to the costs which the bail was obliged to pay on default of the principal; but no such promise will be implied for the non-appearance of the principal, because it would be against public policy.⁸⁰

It has been held that bail will not be taken who have secured indemnity from the principal, as the sureties would be relieved from any motive to exert themselves in securing the appearance of the accused.⁸¹ But this doctrine does not apply to contribution among sureties; so when one of the sureties is compelled to pay the penalty he can have contribution against his co-surety.⁸²

§ 416. EXPRESS CONTRACT OF INDEMNITY TO BAIL.—The law will not enforce, it seems, an express agreement to indemnify bail by the principal, as it would be against public policy.⁸³ But indemnity for costs and expense incurred by the surety is valid, and not against public policy.⁸⁴ But indemnity for the amount the bail must pay as to the penalty cannot be collected. And so where the principal has deposited money as indemnity and is exonerated, he cannot recover it, as the contract was illegal and the courts will not interfere.⁸⁵ However, a third party may indemnify the bail, which they may recover, as it is not an illegal contract.⁸⁶ And such contract of indemnity by a third party need not be in writing, as the bail is not given for the purpose of answering for the debt of another in a civil action, so the statute cannot apply.⁸⁷

In some States indemnity to bail in criminal cases is allowed. Hence, a bond and mortgage given to indemnify the bail by the

⁸⁰ *Jones v. Orchard*, 16 C. B. 614.

⁸¹ *United States v. Simmons*, 47 Fed. Rep. 375.

⁸² *Belond v. Guy*, 20 Wash. 160.

⁸³ *United States v. Simmons*, 47 Fed. Rep. 375.

⁸⁴ *Jones v. Orchard*, 16 C. B. 614; *Harp v. Osgood*, 2 Hill (N. Y.), 216.

⁸⁵ *Dunkin v. Hodge*, 46 Ala. 523; *Herman v. Jeuchner*, 15 Q. B. Div. 561.

⁸⁶ *People v. Ingersoll*, 14 Abb. Pr., N. S., 23; *Stevens v. Hay*, 61 Ill. 399; *Harp v. Osgood*, 2 Hill, 216.

⁸⁷ *Cripps v. Hartnoll*, 4 B. & S. 414; *Anderson v. Spencer*, 27 Ind. 315.

principal does not render them void.⁸⁸ And so it is held that a bail may maintain an action against their principal for money paid to indemnify them for what they have been obliged to pay on their recognizance.⁸⁹ There can be no valid distinction, in principle, between a contract made by the accused and one made by somebody else for his benefit. But such distinction seems to exist in the text-books, resulting in contracts on the one hand being held valid and on the other hand being disproved. In view of the fact that contracts for the indemnity of sureties upon bail bond in criminal cases have been frequently enforced in the courts, it is strong evidence that they have been presumed, by the bar and bench, to be legal.⁹⁰

§ 417. **EXTENT OF SURETIES' LIABILITY.**—The sureties are only liable for the amount mentioned in the obligatory part of the bond, though a different and larger amount be recited in the other part of the instrument. Thus, where the obligatory part is in the sum of \$2,000 and the condition recites that the accused is held to bail in the sum of \$2,500, the only effect is that the judgment which has been rendered for \$2,500 be reduced to \$2,000.⁹¹ So where the principal enters into a recognizance of \$100, and the sureties are bound in the sum of \$200, they can be held only for \$100, the same as their principal.⁹²

§ 418. **COSTS.**—The costs follow the judgment by operation of law, and constitute a distinct liability which are not discharged by remission of the forfeiture.⁹³ So when a party is pardoned for a crime for which he has been convicted, this does not discharge costs, but only the penalty.⁹⁴

⁸⁸ *Maloney v. Nelson*, 158 N. Y. 351; *Simpson v. Robert*, 35 Ga. 180.

⁸⁹ *Reynolds v. Harral*, 2 Strob. (S. Car.) 87. See, also, *People v. Skidmore*, 17 Cal. 260.

⁹⁰ *Maloney v. Nelson*, 12 App. Div. 545; 158 N. Y. 351.

⁹¹ *Hodges v. State*, 20 Tex. 493.

⁹² *People v. Morrison*, 75 Mich. 30.

⁹³ *State v. Bebee*, 87 Iowa, 636; *Chambless v. State*, 20 Tex. 197; *Commonwealth v. Schick*, 61 Pa. St. 495; *Commonwealth v. Ramsey*, 2 Duv. (Ky.) 385.

⁹⁴ *Holliday v. People*, 5 Gil. (Ill.) 214; *Ex parte McDonald*, 2 Wheat. 440.

§ 419. JOINT AND SEVERAL LIABILITIES OF SURETIES.—In many of the States the liability of the sureties is fixed by statute as to the nature of their liability, whether joint or several. The statute generally provides that the liability shall be joint and several, which must control the terms of the bond.⁹⁶ And there is generally a provision authorizing a taking of forfeiture against the sureties, or one or more of them, with or without their principal. In the absence of a statute controlling, the liability of the sureties is fixed by the terms of the bond, and judgment must be taken accordingly.⁹⁶

§ 420. EFFECT OF PARDON.—A full and complete pardon of the accused at a time subsequent to a forfeiture of a bail bond does not release the sureties from liability on the bond.⁹⁷ Because the pardon does not reach a matter wholly independent of the criminal offense charged, or of the punishment therefor after forfeiture.⁹⁸ The pardon relieves the accused from the penalty and nothing more, and cannot be applied so as to relieve the sureties after forfeiture.⁹⁹

And where a fine and imprisonment are imposed, a suspension of the imprisonment by the governor does not discharge the fine, and the sureties are still liable.¹⁰⁰

See, also, *United States v. Lancaster*, 4 Wash. C. C. 64; *Rowe v. State*, 2 Bay (S. Car.), 565. Compare *Cade v. Gordon*, 88 Ga. 461.

⁹⁶ *Kilgrow v. State*, 49 Ala. 337; *Avant v. State*, 33 Tex. Crim. 312; *State v. Lyons*, 7 La. Ann. 540; *Swerdofeger v. Gordon*, 88 Ga. 461.

⁹⁷ *People v. McFarland*, 9 Ill. App. 275; *Parrish v. State*, 14 Md. 238; *Fulton v. State*, 14 Tex. App. 32; *State v. Davidson*, 20 Mo. 212; *Ishmael v. State*, 41 Tex. 244; *Hildreth v. State*, 5 Blackf. (Ind.) 80; *Ellison v. State*, 8 Ala. 273; *Madison v. State*, 2 A. K. Marsh. (Ky.) 131; *People v. Bugbee*, 1 Idaho, 88; *Brewer v. State*, 6 Lea, 198, overruling *Scott v. State*, 1 Head, 433.

⁹⁸ *Dale v. Commonwealth*, 101 Ky. 612.

⁹⁹ *Weatherwax v. State*, 17 Kan. 427; *State v. Davidson*, 20 Mo. 212.

¹⁰⁰ *Mount v. Commonwealth*, 2 Duv. (Ky.) 95.

¹⁰⁰ *State v. Miller*, 96 Iowa, 375; *Holliday v. People*, 10 Ill. 214; *Ester v. Lacy*, 35 Iowa, 419; *State v. Farley*, 8 Blackf. (Ind.) 229; *Ex parte McDonald*, 2 Whart. 440; *State v. O'Blemis*, 21 Mo. 272.

§ 421. DELIVERY OF PRINCIPAL BY BAIL TO PROPER OFFICER.—The surrender of the principal by the bail to the proper officer releases them from further liability,¹⁰¹ and they have the right to pursue him into any State within the United States and arrest him for the purpose of surrender. And the fact that the recognizance has been forfeited, and a conditional judgment against the sureties has been entered, will not deprive them of their rights to arrest and surrender him.¹⁰²

The surrender should generally be made to the sheriff, or by a certified copy of the bail bond, with instructions to the officer to arrest the principal.¹⁰³ And a surrender by a certified copy of the bond is sufficient, though the accused is in prison for another crime.¹⁰⁴ A voluntary surrender of the principal is sufficient to discharge the sureties, if his knowledge of the accused and the surrounding circumstances is of that kind which identifies the party as the one under bail.¹⁰⁵ And so if the principal appears at the commencement of the trial, it is a constructive surrender of him to the officer, and the sureties' liability ceases.¹⁰⁶ But the surrender must be actual, and not constructive.¹⁰⁷

§ 422. BAIL ON APPEAL.—An appeal bond, where the sureties bind themselves to pay the fine if the judgment is affirmed, cannot be satisfied by the surrender of the principal when the judgment is affirmed. Nothing but payment will

¹⁰¹ *State v. Murmann*, 124 Mo. 502; *People v. McReynolds*, 102 Cal. 308; *Norfolk v. People*, 43 Ill. 9; *Taylor v. Taintor*, 16 Wall. 366; *Bearden v. State*, 89 Ala. 21; *State v. Lingerfelt*, 109 N. Car. 775; *State v. Rosseau*, 39 Tex. 614; *Kellogg v. State*, 43 Miss. 57.

¹⁰² *State v. Lingerfelt*, 109 N. Car. 775; *Bearden v. State*, 89 Ala. 21.

¹⁰³ *Slemberg v. State*, 42 Ark. 127.

¹⁰⁴ *State v. Trahan*, 31 La. Ann. 715.

¹⁰⁵ *Walter v. People*, 28 Ill. App. 645; *Babb v. Oakley*, 5 Cal. 94.

¹⁰⁶ *Willie v. Commonwealth*, 85 Ky. 65; *Askins v. Commonwealth*, 1 Duv. 275, overruling *Commonwealth v. Coleman*, 2 Met. (Ky.) 382.

¹⁰⁷ *State v. McMichael*, 50 La. Ann. 428.

release the sureties' liability.¹⁰⁸ But where there is no such obligation assumed by the sureties, the sureties' liability will cease with the conviction of the principal.¹⁰⁹

§ 423. **APPEARANCE OF PRINCIPAL.**—The principal must appear at the date stipulated. He cannot be required to appear at a time contrary to that specified. So when a day has been fixed for his appearance, but is changed by act of the legislature, and he appears according to his obligation, this is a sufficient compliance, and his sureties are discharged.¹¹⁰ But a clerical mistake as to the date of the month named in the recognizance is immaterial, as he must take notice of the day on which the term of court commences, will not discharge him.¹¹¹ If, however, the time is specified as the next term of court, and the time is changed by the legislature, this does not affect his liability, and he must appear at the next term of court.¹¹² But the principal is not required to appear at a special term which intervenes before the regular term.¹¹³

The bond is generally so made out as to require the principal to appear from day to day, which he must do, in order not to forfeit his bond;¹¹⁴ and also from term to term.¹¹⁵ Where the only condition is that the accused shall appear on a day certain, and nothing further is required, an appearance on that day ful-

¹⁰⁸ *State v. Stommel*, 89 Iowa, 67; *State v. Meier*, 96 Iowa, 375.

¹⁰⁹ *Mitchell v. Commonwealth*, 12 Bush, 247; *State v. Schexneider*, 45 La. Ann. 1445.

¹¹⁰ *State v. Stephens*, 2 Swan (Tenn.), 308.

¹¹¹ *Mooney v. People*, 81 Ill. 134.

¹¹² *Walker v. State*, 6 Ala. 350.

¹¹³ *State v. Aubrey*, 43 La. Ann. 188; *State v. Houston*, 74 N. Car. 174.

¹¹⁴ *Allen v. Commonwealth*, 90 Va. 356; *Rubush v. State*, 112 Ind. 107; *Stokes v. People*, 63 Ill. 489; *Peiple v. Millham*, 100 N. Y. 273; *People v. Gordon*, 39 Mich. 259.

¹¹⁵ *State v. Baldwin*, 78 Iowa, 737; *Glasgow v. State*, 41 Kan. 333; *Chase v. People*, 2 Colo. 528; *Gallagher v. People*, 91 Ill. 590; *State v. Whitson*, 8 Blackf. (Ind.) 178; *Williams v. State*, 55 Ala. 71.

fills that condition, and if the court adjourns without further orders, the principal is discharged, and, of course, his bail also.¹¹⁶

If a change of venue is legally granted, the liability of the sureties follows the suit.¹¹⁷ But when the change of venue is illegally granted it is a nullity, and the sureties are not liable for the non-appearance of the principal to the appellate court.¹¹⁸ A mere granting an order of change of venue with consent of the parties, without further proceedings to complete the change, and which is set aside at the same term of court, does not release the sureties, although a change of venue perfected would release them under the statute.¹¹⁹

§ 424. RE-ARRESTING PRINCIPAL ON THE SAME CHARGE.—The sureties on a bail bond are released by the re-arrest of the accused on the same charge.¹²⁰ By such second arrest the principal is placed in the control of the officer of the law precisely as he would be if the bail should surrender him; therefore, they are discharged from further liability.¹²¹ But if the accused does not appear, and is not delivered by his sureties, then the court may arrest him, and if he escapes, after forfeiture of the bond, the sureties will be liable.¹²²

When the sureties surrender the principal to the court, then their liability ceases, and they are not responsible for the acts of the officer of the court. Their legal right to control him is gone, and they cannot be held to produce him.¹²³

¹¹⁶ *Ogden v. People*, 62 Ill. 63; *State v. Becker*, 80 Wis. 313; *State v. Mackey*, 55 Mo. 51; *Swank v. State*, 3 Ohio St. 429.

¹¹⁷ *Commonwealth v. Austin*, 11 Gray, 330; *Williams v. McDaniel*, 77 Ga. 4; *State v. Brown*, 16 Iowa, 314.

¹¹⁸ *Adams v. People*, 12 Ill. App. 380.

¹¹⁹ *Gray v. Commonwealth*, 100 Ky. 645.

¹²⁰ *Medlin v. Commonwealth*, 11 Bush, 605; *Commonwealth v. Bronson*, 14 B. Mon. 361; *State v. Ossler*, 48 Iowa, 343; *People v. Stager*, 10 Wend. 431; *Smith v. Kitchens*, 51 Ga. 158; *State v. Jones*, 29 Ark. 127.

¹²¹ *State v. Holmes*, 23 Iowa, 458; *Commonwealth v. Coleman*, 2 Met. (Ky.) 322; *People v. Stager*, 10 Wend. 431.

¹²² *Commonwealth v. Brand*, 1 Bush, 59.

¹²³ *Wilson v. People*, 10 Ill. App. 357; *People v. McReynolds*, 102 Cal. 308; *People v. Stager*, 10 Wend. 431; *Whaler v. State*, 39 Kan. 163.

It is held by some courts that an illegal arrest of the principal releases the sureties because they are compelled to submit to the proceedings of the court and are deprived of the custody of the principal.¹²⁴ But other courts hold that an illegal arrest does not release the sureties, because such second arrest is a nullity.¹²⁵

The arrest of the principal on the same charge by the Federal authorities operates to discharge the sureties on the State bond.¹²⁶

§ 425. GIVING A NEW BOND.—Where the principal appears in compliance with his recognizance and gives a new bail bond, his former sureties are no longer liable.¹²⁷ And so the sureties before forfeiture are released from liability by a second arrest and a new bond given on the same indictment.¹²⁸ And they cannot thereafter be held, although the second bond is invalid and is set aside.¹²⁹ But where the principal escapes after forfeiture and is arrested and gives a new bond, this does not release the former securities.¹³⁰

§ 426. ARRESTING PRINCIPAL ON DIFFERENT CHARGE.—When the principal is arrested on a different charge and held in custody, which makes it impossible for the first sureties to produce him, this operates to discharge them.¹³¹ But the mere temporary detention, as taking time to give a bond on another charge will not release them.¹³² Thus, if he be arrested on another charge and fined, stopping to pay the penalty is not a

¹²⁴ *Commonwealth v. Bronson*, 14 Mon. 361; *Medlin v. Commonwealth*, 11 Bush, 605.

¹²⁵ *Ingram v. State*, 27 Ala. 17; *Chapell v. State*, 30 Tex. 613.

¹²⁶ *Commonwealth v. Overby*, 80 Ky. 208; *Commonwealth v. Webster*, 1 Bush, 616; *Belding v. State*, 25 Ark. 315.

¹²⁷ *Schneider v. Commonwealth*, 3 Met. (Ky.) 409.

¹²⁸ *Peacock v. State*, 44 Tex. 11.

¹²⁹ *Peacock v. State*, 44 Tex. 11.

¹³⁰ *State v. Martin (La.)*, 24 South. Rep. 590; *Reed v. Police Court*, 172 Mass. 427.

¹³¹ *State v. Spear*, 54 Vt. 503; *People v. Bartlett*, 3 Hill (N. Y.), 570; *People v. Robb*, 98 Mich. 397; *Caldwell v. Commonwealth*, 14 Gratt. (Va.) 698.

¹³² *West v. Colquitt*, 71 Ga. 559; *Hartley v. Colquitt*, 72 Ga. 351.

sufficient detention to release the bail.¹³³ The sureties are not discharged if he escapes from the second arrest, for he is then not detained by the law, but can be arrested and delivered to the court.¹³⁴

The liability of the sureties is not affected by the arrest and detention of their principal in another county, because they can secure him on a *habeas corpus* and deliver him to the proper officer,¹³⁵ unless he has been removed from the county by order of the provost marshal; this action of a Federal officer releases them.¹³⁶ And the same result will follow if arrested by military authority and detained as a soldier.¹³⁷ And so where the principal is arrested, tried, convicted and imprisoned, rendering it impossible to produce him, the sureties are released.¹³⁸

§ 427. SURETIES ARE RELEASED BY A CHANGE OF THEIR OBLIGATIONS.—The rights and liabilities of bail are in many respects different from those of sureties on ordinary civil bonds, yet their position is similar in respect to the limitation of their liability to the precise terms of the contract and the effect upon such liability by any change in these terms without their consent. So if the State makes any contract with the principal, either beneficial or detrimental to the sureties, without their consent, it operates to release them. Thus, where the State allows him to be extradited, his sureties are set free from liability.¹³⁹ And where the condition of the recognizance provides for the appearance of the principal at the next regular term and at any subsequent term, an agreement between him and the State, superseding this condition without the sureties' consent,

¹³³ *People v. Robb*, 98 Mich. 397.

¹³⁴ *Wheeler v. State*, 38 Tex. 173; *Bishop v. State*, 16 Ohio St. 419.

¹³⁵ *State v. Merrihew*, 47 Iowa, 112; *Havis v. State*, 62 Ark. 500; *Brown v. People*, 26 Ill. 28; *Mix v. People*, 26 Ill. 32; *Wheeler v. State*, 38 Tex. 173; *Ingram v. State*, 27 Ala. 17.

¹³⁶ *Commonwealth v. Webster*, 1 Bush, 616.

¹³⁷ *Belding v. State*, 25 Ark. 315.

¹³⁸ *Caldwell v. Commonwealth*, 14 Gratt. 698; *People v. Bartlett*, 3 Hill (N. Y.), 570.

¹³⁹ *Reese v. United States*, 9 Wall. 13.

will discharge them.¹⁴⁰ But the fact that the indictment found against the principal and properly presented in open court at one term, but not entered upon the docket until the succeeding term, is not a cause for discharging the bail, because the principal's right was not affected in any way by the non-entry of the case upon the docket at the first term.¹⁴¹

§ 428. EXONERATION OF BAIL BY ACT OF GOD.—The sureties are exonerated from liability where the performance of the condition is rendered impossible by the act of God.¹⁴² Thus, where the principal is too sick to appear it will exonerate the sureties.¹⁴³ But it is held on the contrary that the principal being sick in another county did not exonerate them from producing him in court.¹⁴⁴ If the money has been paid by the surety after forfeiture, he is not entitled to its recovery upon the death of the principal.¹⁴⁵ As a general rule, if failure of the principal to appear is caused by the act of God, he will be excused.¹⁴⁶

§ 429. EXONERATION BY ACT OF LAW.—The sureties are also relieved of liability by act of law. Thus, if the principal is arrested in the State where the obligation is given, and sent out of the State upon extradition, such act will release the sure-

¹⁴⁰ *United States v. Backland*, 33 Fed. Rep. 156. See, also, *Swank v. State*, 3 Ohio St. 433; *Keefhauer v. Lowe*, 2 Pa. St. 241; *State v. Babb*, 39 Mo. App. 543. Compare *State v. Haskitt*, *Riley* (S. Car.), 97.

¹⁴¹ *State v. Spear*, 54 Vt. 503; *King v. Clark*, 5 B. & A. 728.

¹⁴² *Taylor v. Taintor*, 16 Wall. 366; *People v. Bartlett*, 3 Hill (N. Y.), 370; Co. Litt. 306a; *People v. Manning*, 8 Cow. (N. Y.) 297; *Piercy v. People*, 10 Ill. App. 219; *State v. Traphager*, 45 N. J. L. 134; *Pynes v. State*, 45 Ala. 52.

¹⁴³ *State v. Tubbs*, 37 N. Y. 586. Compare *Piercy v. People*, 10 Ill. App. 219; *State v. Edwards*, 4 Humph. 226.

¹⁴⁴ *Piercy v. People*, 10 Ill. App. 219.

¹⁴⁵ *People v. Rich*, 36 App. Div. (N. Y.) 60.

¹⁴⁶ *Payne v. State*, 45 Ala. 52; *Caldwell v. Commonwealth*, 14 Gratt. 698; *State v. Edwards*, 4 Humph. 226; *Scully v. Kirkpatrick*, 79 Pa. St. 324; *People v. Tubbs*, 37 N. Y. 586; *State v. McNeal*, 18 N. J. L. 333; *Way v. Wright*, 5 Met. 380; *McClelland v. Chambers*, 1 Bibb (Ky.), 366; *State v. Scott*, 20 Iowa, 63; *State v. Cone*, 32 Ga. 663; *Chase v. People*, 2 Colo. 481; *Parker v. Bidwell*, 3 Conn. 84.

ties.¹⁴⁷ But where the bail permit their principal to go into another State of his own volition, where he is arrested for another crime, this does not operate to release the sureties, because they had the friendly custody of the principal, and it was their neglect that allowed his departure from the State where the obligation was executed;¹⁴⁸ and even if he is imprisoned in the other State, this does not release the home sureties.¹⁴⁹

§ 430. EXONERATION BY ACT OF OBLIGEE.—The act of the obligee, or State, may also discharge the surety.¹⁵⁰ Thus, where the governor of the State recognizes a requisition from another State and delivers the principal, who is taken out of the State, this operates to release the bail.¹⁵¹ So where the State and principal make a separate contract unknown to the sureties, varying their liability, it releases them.¹⁵² So where the State enacts that all prior recognizances shall be void, and directs the court in which they are pending to dismiss them, the sureties are discharged;¹⁵³ and so where the court before which the principal is to appear is abolished without qualifications.¹⁵⁴

§ 431. EXONERATION OF SURETIES IN GENERAL.—The dis-

¹⁴⁷ *State v. Allen*, 2 Humph. 258; *Devine v. State*, 5 Sneed (Tenn.), 626; *State v. Adams*, 3 Head (Tenn.), 260; *Taylor v. Taintor*, 16 Wall. 366, 369; *Cain v. State*, 55 Ala. 170.

¹⁴⁸ *Withrow v. Commonwealth*, 1 Bush, 17; *Yarbrough v. Commonwealth*, 89 Ky. 151; *State v. Horn*, 70 Mo. 466; *Taintor v. Taylor*, 36 Conn. 242.

¹⁴⁹ *State v. Scott*, 20 Iowa, 63; *Hartington v. Dennie*, 13 Mass. 92; *King v. State*, 18 Neb. 375; *United States v. Van Fossen*, 1 Dill. 406; *Devine v. State*, 5 Sneed, 623.

¹⁵⁰ *Taylor v. Taintor*, 16 Wall. 366, 369; *State v. Allen*, 2 Humph. 258; *Steelman v. Mattex*, 38 N. J. L. 247; *State v. Adams*, 3 Head, 260; *Buffingham v. Smith*, 58 Ga. 341.

¹⁵¹ *Taylor v. Taintor*, 16 Wall. 366.

¹⁵² *Reese v. United States*, 9 Wall. 13; *United States v. Backland*, 33 Fed. Rep. 156.

¹⁵³ *Doniphan v. State*, 50 Miss. 54.

¹⁵⁴ *Taylor v. Taintor*, 16 Wall. 366, 369. See, also, *State v. Berry*, 34 Ga. 546.

charge of the principal is also a discharge of the bail.¹⁵⁵ So if the principal is taken from the custody of the bail by the military, the bail are released.¹⁵⁶ But if he voluntarily enlists this does not discharge the principal, as held by the weight of authority,¹⁵⁷ though there are other decisions to the contrary.¹⁵⁸

The State may also remit the penalty, and thereby discharge the sureties.¹⁵⁹ The conviction of the principal operates as an *exoneretur* of the bail without formal entry to that effect,¹⁶⁰ unless the bond provides that the principal shall abide the judgment of the court.¹⁶¹ If the principal is arrested after conviction, the bail are discharged.¹⁶² And the postponement of the trial without the knowledge or consent of the sureties renders the recognizance void.¹⁶³ Quashing the indictment or entering a *nolle prosequi* does not discharge the bail, and if another indictment is found, they must produce the principal, when the recognizance provides that the principal shall not depart the court without leave.¹⁶⁴ The *nolle* of a criminal proceeding in a certain form, leaving a potentiality of its future prosecution in a different method, does not *ipso facto* discharge the principal or sureties from the obligation of the recognizance and bond;¹⁶⁵ that is, the second indictment includes the offense described in

¹⁵⁵ *Lyons v. State*, 1 Blackf. (Ind.) 309; *State v. Glenn*, 40 Ark. 332; *Smith v. Commonwealth*, 91 Ky. 588; *Wells v. McCoy*, 4 Cow. (N. Y.) 410; *People v. Felton*, 36 Barb. (N. Y.) 429; *State v. Cobb*, 44 Mo. App. 375; *State v. Wilson*, 14 La. Ann. 450; *Roberts v. Gordon*, 86 Ga. 386.

¹⁵⁶ *Belding v. State*, 25 Ark. 315.

¹⁵⁷ *Huggins v. People*, 39 Ill. 241; *Winninger v. State*, 23 Ind. 228; *Hartington v. Dennie*, 13 Mass. 93; *State v. Scott*, 20 Iowa, 63.

¹⁵⁸ *Commonwealth v. Terry*, 2 Duv. (Ky.) 383; *People v. Caskney*, 44 Barb. 118. See sec. 411.

¹⁵⁹ *Harbin v. State*, 75 Iowa, 263.

¹⁶⁰ *Roberts v. Gordon*, 86 Ga. 386.

¹⁶¹ *Campbell v. State*, 18 Ind. 375; *State v. Stewart*, 74 Iowa, 336.

¹⁶² *Moorehead v. State*, 38 Kan. 489; *Jackson v. State*, 52 Kan. 249; *State v. Murmann*, 124 Mo. 502; *Childers v. State*, 25 Tex. Cr. App. 653.

¹⁶³ *Reese v. United States*, 9 Wall. 13; *State v. Mackey*, 55 Mo. 51. Compare *State v. Smith*, 66 N. Car. 620.

¹⁶⁴ *State v. Hancock*, 54 N. J. L. 393; *State v. Brooks*, 48 La. Ann. 855.

¹⁶⁵ *Silvers v. State*, 59 N. J. L. 428.

the bail bond and grows out of the same transaction.¹⁶⁶ And the mere failure to indict does not discharge the bail,¹⁶⁷ as the court must release the principal.¹⁶⁸ And it matters not, though the principal is indicted for an offense different than the one for which he gives bail.¹⁶⁹

The loss of the indictment has no effect as to the bond.¹⁷⁰ But if the recognizance is taken by an officer who had no authority so to do, it is void.¹⁷¹ And if the bond recites no crime against the law it is void.¹⁷² And when the principal is required to give bail in separate and distinct sums, a single bond covering the aggregate amount, is void.¹⁷³ And so if the office of the justice is changed after bail is given, and before the time set for appearance, and the parties without any knowledge of such change appear at the former place, the bail is discharged.¹⁷⁴

Where the sureties and principal are liable severally, and not jointly, a remission of the penalty after forfeiture does not release the sureties.¹⁷⁵ A bond not certified and filed according to law, and not returned until the officer is out of office by expiration of his term, is void.¹⁷⁶ For a bond taken in criminal cases must be according to law.¹⁷⁷ And in an action on the

¹⁶⁶ *Hortsell v. State*, 45 Ark. 59; *Commonwealth v. Skiggs*, 3 Bush, 19; *State v. Brooks*, 48 La. Ann. 855; *Arche v. Commonwealth*, 10 Gratt. 627; *State v. Haskett*, 3 Hill (S. Car.), 95. Compare *People v. Felton*, 36 Barb. 429; *State v. Mathis*, 3 Ark. 84; *State v. Langton*, 6 La. Ann. 282.

¹⁶⁷ *Fitch v. State*, 2 Nott & M. (S. Car.) 558.

¹⁶⁸ *State v. Doane*, 30 La. Ann. 1194; *Fleece v. State*, 25 Ind. 384; *Commonwealth v. Roberts*, 4 Met. (Ky.) 220; *Jones v. State*, 11 Tex. Cr. App. 412.

¹⁶⁹ *Pack v. State*, 23 Ark. 235; *Duke v. State*, 35 Tex. 424; *Commonwealth v. Slocum*, 14 Gray, 395; *Commonwealth v. Butland*, 119 Mass. 317.

¹⁷⁰ *Crouch v. State*, 25 Tex. 755; *Price v. State*, 42 Ark. 178.

¹⁷¹ *State v. Winninger*, 81 Ind. 51; *Commonwealth v. Roberts*, 1 Duv. (Ky.) 199. Compare *Pack v. State*, 23 Ark. 235.

¹⁷² *Foster v. State*, 27 Tex. 236; *Nicholson v. State*, 2 Ga. 363.

¹⁷³ *United States v. Goldstein*, 1 Dill. 43; *State v. Buffum*, 22 N. H. 267.

¹⁷⁴ *Hammon v. State*, 38 Ind. 32.

¹⁷⁵ *State v. Davidson*, 20 Mo. 212.

¹⁷⁶ *State v. Pratt*, 148 Mo. 402.

¹⁷⁷ *Dickinson v. State*, 20 Neb. 72; *Powell v. State*, 15 Ohio, 579; *State v. Clarke*, 15 Ohio, 595; *Williams v. Shelby*, 2 Oreg. 144; *State v. Winninger*, 81 Ind. 53.

undertaking of bail, the obligation of the sureties is not affected by the question whether the prosecution of the offense is barred by the statute of limitations.¹⁷⁸

§ 432. SUBROGATION IN CRIMINAL CASES.—To enable the bail to escape the payment of their recognizance by performance with which the recognizance binds them to do, the State will lend them its aid in every proper way by process and without process to seize the person of the principal and compel his appearance. This is the kind of subrogation which exists in a criminal case; that is, subrogation to the means of enforcing the performance of the thing which the recognizance of bail is intended to secure the performance of, and not subrogation to the peculiar remedies which the State may have for collecting the penalty. Subrogation to the State's remedies would clearly be against public policy by subverting as far as it might prove effectual the very object and purpose of the recognizance.¹⁷⁹ And the statute conferring on sureties on bonds to the United States who are forced to pay the obligation, priority over other creditors does not apply to recognizances in criminal proceedings, and does not authorize an action in the name of the United States. Its only advantage is the priority given over other creditors of the principal, and not in the mode and form of procedure.¹⁸⁰

§ 433. EFFECT OF FORFEITURE OF BOND.—Where the principal makes default and does not appear, the recognizance becomes *ipso facto* forfeited, and the liability of the sureties arises and becomes absolute, and a subsequent arrest of the principal does not work an exoneration of the sureties.¹⁸¹ And the arrest of the principal upon a bench warrant and his discharge upon entering into another recognizance to appear and answer to the

¹⁷⁸ United States v. Dunbar, 83 Fed. Rep. 151.

¹⁷⁹ United States v. Ryder, 110 U. S. 729.

¹⁸⁰ United States v. Preston, 4 Wash. C. C. 446; United States v. Ryder, 110 U. S. 729.

¹⁸¹ People v. Bennett, 136 N. Y. 482.

charge, which he kept, is no defense to an action on the first recognizance.¹⁸² And so a subsequent trial and conviction of the principal does not affect the forfeiture.¹⁸³ Because a surety cannot, after the recognizance has been forfeited, discharge himself by surrendering his principal.¹⁸⁴

§ 434. SETTING ASIDE FORFEITURE.—The forfeiture may be set aside under some conditions. Thus, where the principal uses due diligence and is not guilty of laches and appears as soon as possible, with no intent to evade the law, the court will generally grant him and his sureties relief.¹⁸⁵ Each case, however, must be decided according to the circumstances surrounding it.¹⁸⁶

It is within the power of the court, incidental to its jurisdiction in criminal cases, to grant relief to bail where the default was caused by the sickness or death of the accused before forfeiture, and where the death of the principal occurs after forfeiture when the bail is fixed. It is in every case an appeal to the discretion of the court, which will be exercised when justice to the bail demands it and public justice and policy do not prohibit it.¹⁸⁷ But sickness of the surety is no defense, the principal still being at large.¹⁸⁸ Threats against the principal's life is a sufficient excuse for his non-appearance where the officers of the law will not protect him on being so requested.¹⁸⁹ Thus, the fact that the principal has forfeited his bond because he

¹⁸² *People v. Anable*, 7 Hill (N. Y.), 33.

¹⁸³ *Walker v. Commonwealth*, 79 Ky. 292.

¹⁸⁴ *State v. McGuire*, 16 R. I. 519; *People v. Bartlett*, 3 Hill (N. Y.), 570; *State v. Warren*, 17 Tex. 283.

¹⁸⁵ *Wray v. People*, 70 Ill. 664.

¹⁸⁶ *People v. Flynn*, 53 Ill. App. 493; *Rawlings v. State*, 38 Neb. 590; *Riggen v. Commonwealth*, 3 Bush, 493; *Hauglesben v. People*, 89 Ill. 164; *Commonwealth v. Oblenden*, 135 Pa. St. 530.

¹⁸⁷ *State v. Traphagen*, 45 N. J. L. 134; *People v. Tubbs*, 37 N. Y. 586; *Russell v. State*, 45 Ga. 9; *Chase v. People*, 2 Colo. 481; *People v. Manning*, 8 Cow. 297; *Baker v. State*, 21 Tex. Cr. App. 359.

¹⁸⁸ *People v. Meehan*, 14 Daly, 333.

¹⁸⁹ *Fleener v. State*, 58 Ind. 166.

could not appear without danger of losing his life by a mob, will not excuse the bail unless the proper authorities were applied to and were unable or unwilling to extend to the accused the protection necessary to enable him to appear.¹⁹⁰

In order to receive relief the principal must show that it was not his own fault that he did not appear.¹⁹¹ The surety also must not be in fault in conniving at or consenting to the default, in order to secure relief.¹⁹² In some jurisdictions, relief will not be granted until trial of the principal and conviction or discharge adjudged.¹⁹³

§ 435. VOLUNTARY APPEARANCE OR ARREST AFTER FORFEITURE—COSTS.—Generally a forfeiture of recognizance will be vacated on payment of costs and expenses, where, after the default, the principal voluntarily appears in court, in case sufficient cause is shown for his failure to appear according to the obligation of his recognizance.¹⁹⁴ The costs must be paid before relief will be granted in any case,¹⁹⁵ and also the other necessary expense.¹⁹⁶ And a mere agreement to pay the costs is not sufficient; they must actually be paid.¹⁹⁷

§ 436. EFFECT OF REMISSION OF FORFEITURE.—After remission of the forfeiture, then the principal stands in a position as if no forfeiture had occurred, and it is then his duty to comply with the condition of the recognizance and appear in court until the charge against him is legally disposed of.¹⁹⁸

¹⁹⁰ *Weddington v. Commonwealth*, 79 Ky. 582.

¹⁹¹ *People v. McFarland*, 9 Ill. App. 275; *United States v. McGlashire*, 66 Fed. Rep. 537; *Riggen v. Commonwealth*, 3 Bush, 493.

¹⁹² *People v. Smith*, 2 Hilt. (N. Y.) 523.

¹⁹³ *Rex v. Spencer*, 1 Wils. 315; *Rex v. Finmore*, 8 T. R. 409; *State v. Hamill*, 6 La. Ann. 257; *State v. Schexneider*, 45 La. Ann. 1445; *People v. Coman*, 5 Daly, 527; *People v. Fields*, 6 Daly, 410; *People v. Wissig*, 7 Daly, 23; *State v. Saunders*, 8 N. J. L. 177.

¹⁹⁴ *Rawlings v. State*, 38 Neb. 500.

¹⁹⁵ *Ward v. Colquitt*, 62 Ga. 267.

¹⁹⁶ *People v. Brady* (N. Y.), 19 Civ. Pro. Rep. 372.

¹⁹⁷ *People v. Smith*, 43 Ill. App. 217.

¹⁹⁸ *State v. Cornig*, 42 La. Ann. 416.

And an appeal does not lie from the order and judgment of the court in recognizance to remit the forfeiture,¹⁹⁹ except in case of abuse of discretion.²⁰⁰

The power to remit may be exercised for the benefit of the sureties as well as for the principal.²⁰¹

If after forfeiture the accused is surrendered by the bail, and is convicted and punished, the forfeiture will be remitted as to the sureties;²⁰² and if the accused appears and stands trial and is acquitted, this is sufficient ground for remission of the forfeiture,²⁰³ or if he is convicted.²⁰⁴

§ 437. TAKING MONEY IN LIEU OF BAIL.—Where no authority is given by statute to take money in place of bail, a deposit of money so taken is illegal.²⁰⁵ In some jurisdictions the statute provides for taking money in place of bail.²⁰⁶ In these jurisdictions where money may be deposited as bail, and the forfeiture is set aside, the money may be recovered back.²⁰⁷ But where no authority is given to take such money, after it is deposited with the sheriff, it cannot be recovered back,²⁰⁸ though it should be paid into the county treasury just as if collected upon a recognizance.²⁰⁹

¹⁹⁹ *Bross v. Commonwealth*, 71 Pa. St. 262; *Commonwealth v. Oberlander*, 135 Pa. St. 566; *People v. Bennett*, 136 N. Y. 482.

²⁰⁰ *State v. Kraner*, 50 Iowa, 582; *People v. Hobbs*, 46 Ill. App. 206; *State v. Denny*, 10 La. Ann. 335; *Barton v. State*, 24 Tex. 250; *Commonwealth v. Coleman*, 2 Met. 382.

²⁰¹ *Harbin v. State*, 78 Iowa, 263; *State v. Rollins*, 52 Ind. 168.

²⁰² *People v. Johnson*, 4 N. Y. Supp. 705.

²⁰³ *State v. Saunders*, 8 N. J. L. 177; *People v. Higgins*, 7 N. Y. Supp. 658.

²⁰⁴ *People v. Cooney*, 9 N. Y. Supp. 285; *People v. Madden*, 8 N. Y. Supp. 531. Compare *State v. Warrick*, 3 Ind. App. 508.

²⁰⁵ *Smart v. Cason*, 50 Ill. 195; *Reinhard v. Columbus*, 49 Ohio St. 257; *Butler v. Foster*, 14 Ala. 323.

²⁰⁶ *People v. Laidlow*, 102 N. Y. 588; *Morrow v. State*, 6 Kan. 222; *Dean v. Commonwealth*, 1 Bush, 20; *Wash v. State*, 3 Cold. (Tenn.) 91.

²⁰⁷ *Arquette v. Marshall County*, 75 Iowa, 191.

²⁰⁸ *Smart v. Cason*, 50 Ill. 195.

²⁰⁹ *Rock Island v. Mercer County*, 24 Ill. 35.

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